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

CRIMINAL APPEAL NO.AAU 157 of 2016
[In the High Court at Lautoka Case No. HAC 184 of 2013]

BETWEEN:

FUATIA MONISE
Appellant

AND:

STATE
Respondent

Coram: Prematilaka, JA

Counsel: Mr. M. Fesaitu for the Appellant
Mr. S. Babitu for the Respondent

Date of Hearing: 13 July 2020

Date of Ruling: 14 July 2020

RULING

[1] The appellant had been indicted in the High Court of Lautoka on three counts of indecent assault and a single count of rape allegedly committed at Lautoka in the Western Division contrary to section 212 (1) and section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.

[2] The information as set out in the summing-up dated 01 September 2016 consisted of the following counts.

Count 1
Statement of Offence
INDECENT ASSAULT*: Contrary to Section 212 (1) of the Crimes Decree, 2009.*

Particulars of Offence

FUATIA MONISE*, on the 22nd day of October 2010, at Lautoka in the Western Division, unlawfully and indecently used his hand to touch the breasts of OLIVIA DRAUNA.*

Count 2

Statement of Offence

INDECENT ASSAULT*: Contrary to Section 212 (1) of the Crimes Decree, 2009.*

Particulars of Offence

FUATIA MONISE*, on the 22nd day of October 2010, at Lautoka in the Western Division, unlawfully and indecently used his hand to touch the vagina of OLIVIA DRAUNA.*

Count 3

Statement of Offence

INDECENT ASSAULT*: Contrary to Section 212 (1) of the Crimes Decree, 2009.*

Particulars of Offence

FUATIA MONISE*, on the 02nd day of January 2012 and the 31st day of January 2012, at Nadi in the Western Division, unlawfully and indecently assaulted OLIVIA DRAUNA.*

Count 4

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree, 2009.*

Particulars of Offence

FUATIA MONISE*, on the 01st day of February 2012 and the 28th day of February 2012 at Lautoka in the Western Division, inserted his penis into the vagina of OLIVIA DRAUNA, without her consent.*

[3] However, the particulars of charges given in the judgment dated 20 September 2016 give the dates of the incidents in the first and second counts as 22 October 2011 and the third count as 01 January 2012. The sentencing order dated 06 October 2016 too sets out the dates of the first and second counts as 22 October 2011 and the third count as 01 January 2012 whereas the dates in those counts are given as 22 October 2010 and 02 January 2012 respectively in the amended information as mentioned in the summing-up. I think these are either typographical errors or the dates have been erroneously given in the amended information but it cannot be ascertained without the amended information which dates actually reflect the dates in the amended information.

[4] Going by the summing-up where the learned trial judge had said that the first act of sexual invasion occurred in 2010 and the second in 22 October 2011 the date in the first count should be 22 October 2010 whereas the date of the second count should be 22 October 2011. Similarly, I find that the acts in the first and second counts are particularized as *'indecently used his hand to touch the breast'* and *'indecently used his hand to touch the vagina'* respectively. No such particulars are given in the third count of indecent assault. However, the summing-up shows that all acts of indecent assault had involved touching of the breast and private area. Further, the period of time in the third and fourth counts are given as *'on the ……. day of ….. and the*

……. day of …… 2012' . Overall, I get the impression that due care had not been taken in drafting the charges in the information or the amended information.

[5] At the conclusion of the trial on 01 September 2016 the assessors' opinion was unanimous that the appellant was guilty of all counts against him. The learned trial judge had agreed with the assessors in his judgment delivered on 20 September 2016, convicted the appellant and on 06 October 2016 sentenced him to 04 years of imprisonment on each count of indecent assault and 11 years of imprisonment on the charge of rape to run concurrently with a non-parole period of 08 years.

[6] The appellant's timely notice of application for leave to appeal against conviction and sentence had been filed in person on 02 November 2016. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction on 21 March 2019 along with written submissions and an application in Form 3 to abandon the appeal against sentence. The state had tendered its written submissions on 05 June 2020.

[7] 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 **Waqasaqa 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.

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

> *Ground One:*
>
> *The Learned Trial Judge erred in law and fact in delivering a verdict that is unreasonable and not supported by the totality of evidence.*
>
> *Ground Two:*
>
> *The Learned trial Judge erred in law and in fact when he failed to adequately elaborate on the issue of the delay of the complaint which is unfair to the Appellant's case and gives rise to a miscarriage of justice.*

[9] The learned trial judge had summarized the evidence of the complainant as follows in the summing-up.

> *34. First incident occurred at her home in Simla in 2010 when she was 15 years old and attending Natabua High School. At that time Accused was not living with them.*

35. On that particular day, Complainant's mother was at work. Complainant was alone at home. Accused came in night to visit her when she was lying on top of the bunk. He came and touched her breast and private area and asked 'if he could enter her'. She said 'no'. Then, he just walked away.

36. It was Accused's first attempt. He made several attempts later. The next incident happened on 22nd, October 2011 in the wedding night of her namesake/cousin. In this particular night, she was home and her mother was attending the wedding in Votualevu, Nadi. She was sleeping on her bunk. The bottom bunk is a double bed. Monise stood on the bottom bunk and touched her breast and private area. He again asked her if he could 'enter her'. She told him to think about his children because he had children younger than her. Then he stopped. Nothing else happened that day.

37. Complainant felt insecure and unsafe in her own home. She did not tell anyone about this incident because her dad had recently passed away in 2010 and after that her mother was depressed. She also thought how that incident would make her look in front of others and the community. After this incident, she was sitting on her bed awaiting her mother. Mother arrived around 11p.m. She didn't tell her mother what had just transpired. She was also scared of the Accused because he was living with them.

38. Accused's next attempt was in January, 2012. They were staying together in a hotel in Namaka, Nadi. Her mom got drunk and was in the swimming pool. Complainant was in a room upstairs. Accused came up to the room to get something. She was sleeping on the bed. He woke her up. She just turned her back to him. Then he reached over and touched her private area and breasts and asked her the same thing. He asked her if he could 'enter her'. She yelled at him. He stopped and went back down to bring her mother up to the room because she was drunk.

39. Complainant's mother had come to the room and gone to the bathroom. He again asked her if he could 'enter her' quickly. Her mother peeped out of the bathroom and saw Accused touching her private area. Her mother got angry on him for doing that. She was angry on her too. Her mother thought she was letting it happen and thought it was her fault. But he apologized to her mother. Her mother was okay with it. This incident happened around 4 a.m.

40. She told her mother of what had transpired earlier. Her mother just brushed it off and got angry on her and said it was her fault.

41. The next incident happened in February 2012. Complainant's mother had gone to work. Complainant was alone at home in Simla. Accused came around 9 pm. up to the top bunk where she was sleeping and held her down. He held her hands and knelt on the bunk to hold her thighs apart. She was wearing a sulu vakatoga and a t-shirt. He pulled down her underwear and

inserted his penis into her vagina. She tried to scream but he punched her thigh. Then he told her to think about her mother and her depression if she wanted her mother to be happy.

42. Whilst they were in the process of sexual intercourse, Accused heard a car on the road. He stopped and jumped down from the bunk. Her mother had arrived. When her mother came into the house she called the Complainant. But Complainant pretended to be asleep because she didn't want to face her mother. She did not confide with her mother because she knew the way her mother had reacted to the previous incident in the hotel. Complainant was angry with her mother, so she kept quiet.

43. Her mother had dinner and went off to sleep. When she went to the toilet, she saw blood stains on her underwear.

[10] The appellant was the complainant's mother's former *de facto* partner and he had waived his right to counsel and legal aid and defended himself at the trial. He had not denied any of the incidents relating to the charges against him but had taken up the position that they happened with the consent of the complainant.

01st ground of appeal

[11] This ground of appeal resembles a typical scatter gun approach to drafting of appeal grounds (see **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018). However, the written submission of the appellant has elaborated on it by focusing on careless drafting of the third and fourth grounds of appeal and submitted that they seem to give the impression that there had been not two but four incidents on four different days.

[12] However, the appellant has not submitted as to how he got misled and his defense was prejudiced as a result of the manner in which the last two charges had been presented. Neither does it appear that he had raised any concern regarding those two charges at the trial, for I do not find any reference to such an objection on the part of the appellant in the summing-up or the judgment.

[13] Therefore, as correctly pointed out by the respondent the appellant had not been misled by the grammatical errors in the third and fourth charges, for he had defended himself on the basis that they all happened with the complainant's consent. Moreover, the agreed facts reveal that the appellant had admitted that between 01 January and 31 January 2012 (which covers the period in the third count) he was with the complainant and her mother at Grand Melanesian Hotel where the third act of sexual assault had occurred. He had also agreed that between 01 and 28 February 2012 (which is exactly the period in the fourth count) he along with the complainant and her mother were living in the same house where the act of rape had occurred.

[14] In **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) the Supreme Court held

'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: ***Koroivuki v The State*** *CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted:* ***Skipper v Reginam*** *Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. .."*

[15] Therefore, this ground of appeal has no prospect of success at all.

02nd ground of appeal

[16] The appellant argues that the first incident of alleged indecent assault had happened in 2010 and the last incident of act of rape in February 2012 and the matter had got reported only in July 2013 *i.e.* some 03 years after the first incident. During this time, the appellant argues, the complainant had numerous opportunities to complain but had failed to do so and her explanation that she was reluctant to complain because she was worried how it would affect her mother's relationship with the appellant was not a reasonable explanation for the delay and cast doubt on her credibility. The appellant also takes up the position that the trial judge had failed to elaborate on the issue of delay.

[17] To understand what the explanation for the delay was, one needs to turn to the summing-up also, for the judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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 (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) and **Ravulowa v State** [2020] FJCA 93; AAU0090.2018 (1 July 2020)].

[18] The learned trial judge had highlighted the three reasons adduced by the complainant for her belated compliant in paragraph 98 of the summing-up and gone on to address the assessors on other attendant circumstances as well. Before that the trial judge had addressed the assessors in great detail on the evidence of the complainant and her cousin Olivia Tavakai and the appellant and his witnesses.

98. You have to see whether Complainant had given an acceptable and legitimate explanation for not complaining at the first available opportunity. Complainant said that she thought about her depressed mother's condition and did not want to hurt her mother's feelings; that she was scared of the accused as he was around; that she was still schooling and concerned about how people would look at her.

99. Complainant had informed her cousin Olivia Tavakai about the alleged incidents sometime in June 2013. Olivia Tavakai gave evidence and said that she received the information from the complainant in 2013 and that she encouraged the Complainant to go to police.

100. Accused says Complainant made up this case against him after he reconciled with his wife in 2013. He also says if he had forcefully done those acts, Complainant had ample opportunity and could have gone to police much earlier when he had moved out of her place.

101. You decide what weight you attach to the evidence of the Prosecution and the Defence.

102. 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. There is, in other words no classic or typical response. It's a matter for you to determine whether, in the case of this particular Complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the Complainant herself said about her experience and her reaction to it.

[19] Then in the judgment, the learned trial judge had once again analyzed the complainant's explanation in detail for the belated reporting of the matter in the following paragraphs.

'[9] Accused vigorously challenged the evidence of the Prosecution on the basis that Complainant had failed to complain any of the alleged incidents to anyone at the first available opportunity. Accused argues that the fact that Complainant did not report what had happened as soon as possible makes it less likely that the complaint she eventually made to police was true.
[10] First alleged incident occurred in 2011 and the last alleged rape incident occurred in February 2013. These incidents had been reported to police on the 11th July 2013. It is true that the Complainant had failed to make a prompt complaint to police at the earliest opportunity. However, I am satisfied that Complainant had given acceptable and legitimate explanations for the failure.

[11] After the demise of Complainant's father, her mother had been in a very depressed condition. The de facto relationship her mother had started shortly afterwards with the Accused had given her mother a new leaf of life. Complainant did not like the relationship. However, she tolerated the relationship as it had helped to keep her mother happy.

[12] Complainant said that she thought about her depressed mother's condition and did not want to hurt her feelings. Accused was aware of Complainant's vulnerable situation. That's one of the reasons that had discouraged the Complainant from complaining against the Accused. Furthermore, Complainant had realized that it was a futile exercise to complain to her mother against the Accused. Complainant's mother had seen the touching incident that had taken place in the Melanesian Hotel and was

angry about it. However, she had not taken the incident very seriously. Complainant said it was okay with her mother. After that incident, Complainant's mother had accompanied the Complainant to Accused's workplace to reconcile with the Accused and even invited him to come and live with them again.

[13] Complainant felt insecure and unsafe in her own home and said that she was scared of the accused as he was around. She was still schooling and concerned about how people would look at her if the matter was exposed.
[14] Complainant had informed the incidents for the first time to her sister-in-law Asena Drauna in May, 2012. However, Complainant was scared and wanted the matter to be kept a secret. Complainant then shared the information with her cousin/namesake Olivia Tavakai sometime in June 2013. Olivia Tavakai had taken the matter very seriously. Tavakai gave evidence and said that she received the information from the Complainant in 2013 and encouraged the Complainant to go to police. However, Complainant did not want the matter to be reported to police and begged her not to do so.
[15] Eventually, after several efforts, Tavakai managed to convince the Complainant to go to police. Complainant had finally realized that the damage had been done to her and it was the right thing to complain to police. Complainant explained what made her change her mind in 2013 to report the matter to police. Her namesake/cousin encouraged her to report it. Eventually, she thought it was the right thing to do. By that time, she didn't really care what people think. Her namesake even assured her that the report will be confidential. With that assurance, her namesake pushed her to report the matter to Police. That is how the Accused was finally brought to book.

[20] The appellant cites **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) on how to deal with a delayed complaint where it was held:

'[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] 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.'*

[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).

[21] Judged against the above guidelines on evaluation of a belated complaint, I cannot find fault with the manner in which the learned trial judge had addressed the assessors and himself.

[22] At the hearing, the counsel for the appellant joined issue with the learned trial judge's statement in paragraph 8 of the judgment that he had considered Olivia Tavakai's testimony as evidence of recent complaint evidence. The counsel also cited paragraphs 45 and 56 of the summing-up in support of his argument.

'45. Complainant then shared this information with her cousin (namesake), Olivia Tavakai. Tavakai encouraged Complainant to report the matter to police. Complainant begged her not to report because she was still in high

school and was worried about how people will look at her. She was also worried that Accused was staying with her mother and her mother was still angry with her for what had happened. She eventually reported the matter to police in July 2013.

'56. Witness Tavakai testified of what her namesake (Complainant) had shared with her. Complainant had shared the information as to how she was sexually assaulted and raped by her mother's partner. Complainant informed these incidents when the witness visited her at her Simla house sometime in 2013. By that time, Complainant was in Form 6. Complainant informed the witness how her mother's partner would forcefully have sex with her on four occasions. He had tried 3 times to sexually assault her by trying to push himself over her and, in one incident, he punched her thighs trying to get her pants off. One incident had happened on her wedding day, on 22nd October 2011 when her mother had come over to attend the wedding.

[23] The argument raised by the appellant's counsel is that from Tavakai's testimony it appears that what the complainant had told her in June 2013 is somewhat different from her version of events narrated in evidence at the trial. At first blush, there may appear to be some inconsistency as alleged by the appellant's counsel. However, one would be naïve to expect a victim of sexual abuse to describe those acts with mathematical precision to a third party whereas in a court room atmosphere under the guidance of an experienced lawyer the victim is likely to divulge such details sequentially and with a lot more clarity. I do not think that the substratum of the complainant's evidence has been hurt by what she is supposed to have told Tavakai.

[24] Therefore, this ground of appeal too is devoid of reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL