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

CRIMINAL APPEAL NO.AAU 0024 of 2017
[In the High Court at Suva Case No. HAC 234 of 2016]

BETWEEN	:	**MITIELI WAIVONO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant**
	:	**Ms. S. Tivao for the Respondent**
Date of Hearing	:	**17 July 2020**
Date of Ruling	:	**20 July 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on eight counts of rape committed at Taviya Village, Levuka in the Eastern Division in July and August 2014 contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

***MITIELI WAIVONO** on the 9th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 14th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

THIRD COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 19th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 4th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 5th day of August, 2014 at Taviyu Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

SIXTH COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 6th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

SEVENTH COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 7th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

MITIELI WAIVONO *on the 8th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

[3] At the conclusion of the trial on 30 January 2017 the assessors' opinion was unanimous that the appellant was guilty of all counts as charged. The learned trial judge had agreed with the assessors in his judgment delivered on 06 February 2017,

convicted the appellant on 07 February 2017 and sentenced him to 12 years and 03 months of imprisonment on each count to run concurrently with a non-parole period of 09 years and 09 months.

[4] The appellant's timely applications in person for leave to appeal against conviction and sentence had been signed on 14 February 2017 (received by the CA registry on 15 and 20 February 2017 respectively). Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction on 20 March 2019 along with written submissions. The appellant had also filed an application to abandon his appeal against sentence (Form 3) on 02 April 2019. The state had tendered its written submissions on 20 April 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 **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.

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

> *'Ground One*
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> *The Learned Trial Judge erred in law and in fact when he did not consider the opportunities that the complainant had to report the matter as soonest to the police and also to the people who were in authority in Taviya village to whom she knows has the power to protect her particularly the police thus questioning her credibility and also raising more than reasonable doubts to her claim of not consenting to sexual intercourse*

Ground Two

That the Learned Trial Judge erred in law and in fact did not consider the opportunities that were available to the complainant to call the neighbours for help if she was about to be raped eight times but rather kept on going to the appellant house eight times despite of the alleged use of force and threats.

Ground Three

That the Learned Trial Judge erred in law and in fact when he did not consider the evidence of the witnesses called by the defence especially by DW2 Maca, DW4 Saimoni Naivalu and DW3 Maca Ravulo who were very credible and truthful witnesses.

[7] The learned trial judge has summarized the facts as follows.

27. The first witness of the prosecution is Unaisi Naiobasali. She lives at Taviya village, Levuka, Ovalau. She was eighteen years old in 2014. She has been suffering from a heart decease since 2014.

28. On the 9th of July 2014, Unaisi had gone to the school of the accused's son to give his lunch on the request of the accused. When she returned, she had her tea with the accused at his house. The accused then went and closed the door and told her not to worry and be relaxed. He had then pulled her into the sitting room and took off her clothes. He put her on to the bed. He then sucked her breast and licked her vagina. He then had sexual intercourse with her. Unaisi states that she was scared and speechless when he did this. He had threatened her not to tell anyone. If so, he will do something to her and her family. He was on top of her and she could not move away. When she tried to shout, he closed her mouth by his hands. Unaisi states that she did not consent to the accused to have sex with her on the 9th of July 2014. She did not tell anyone about this incident as she was scared of the accused.

29. On the 14th of July 2014, the accused again called her to come to his house to make a free call on his mobile phone, when she was hanging her clothes outside of her house. He kept on calling her. When she went to the door of the kitchen, he pulled her inside and took her to the sitting room. He had then removed her clothes and came on top of her. He then had sexual intercourse with her. Unaisi states that she was scared and thought that he might do something to her and her family. She explained that she went to his house again on 14th of July 2014, after the first incident because he kept on calling and followed her wherever she went. Unaisi said that she did not consent to the accused to have sex with her on the 14th of July 2014. After having sex with her, he forced her to take a recharge card. He had threatened her not to tell anyone, if she does so, he will punch her or do something.

30. On the 19th of July 2014, she went to drop the accused's son's lunch box at his house. He came and got hold of her. He then pulled her into the sitting room and removed her clothes. He then had sexual intercourse with her. She says she did not consent for him to have sexual intercourse with her. Moreover, she says that she could not do anything as he was strong. He had threatened her once again not to tell anyone about this.

31. She went to the accused's house to drop the lunch box of the accused son's on the 4th of August 2014. He pulled her inside and forcefully had sexual intercourse with her without her consent. He threatened her not to tell anyone. She was scared of him and did not tell anyone. The same thing repeatedly happened on the 5th, 6th and 7th of August 2014, when she went to his house to drop his son's lunch box. Unaisi said that she did not consent to the accused at any of these occasions and was scared of him. He had threatened her continuously not to tell anyone. Unaisi said that she had to go to his house because he continuously called her and she was scared that he might come to her house and do something. She was alone at her house at all of these occasions. She was afraid that he might follow her in the village and do something if she did not go to his house.

32. On the 8th of August 2014, the accused called her to his house to adjust his mobile phone. She went there because she was afraid if she did not go, he might come to her house and punch her or do something. He pulled her inside the sitting room and had sexual intercourse with her. She found blood strain on her 'sulu', when she got up from the bed after the incident. The accused gave her another 'sulu' to cover up the blood stain on her 'sulu'.

[8] Finally, the complainant had complained to the mother on 10 August as she was fed up with what the appellant had been doing to her. The reason for her delay in complaining is given at paragraph 33 of the summing-up.

> *'The victim explained in her evidence that all of these eight occasions, the accused threatened her and did not allow her to escape. She was scared of him as he kept on threatening her. She did not tell anyone because of her fear of the accused. No one else was present at his house during these eight occasions.'*

[9] However, under cross-examination she had admitted that she had opportunities to complain earlier as stated in paragraph 36 of the summing-up.

> *'36. **During the cross examination, Unaisi said that she should have reported the matter to the police when she went to hospital to have her injection.** However, she was afraid of the accused that prevented her reporting the matter to the police. She did not report this to anyone in the village, including the village headman, the chief, the pastor, the head teacher*

as she was scared of the accused that he will do something to her or her family.

37. Unaisi further stated that she could not shout for help as the accused threatened her and she was scared of him. The accused held her and prevented her from running away. She explained the vicinity of her house and the house of the accused.

[10] The appellant in his evidence had admitted all acts except the last act of rape in evidence but had stated that all of them were consensual. His evidence was as follows.

40. The accused in his evidence denies the allegation and said that Unaisi came by her own and consented to have sex with him. She used to ask money after having sex at each occasions. The accused in his evidence said one Saimoni came to his house in the night on 8th of July 2014. Saimoni told him that Unaisi wanted to see him at the beach. He then went to the beach and met her. She said she wants him and started to hug him. He then told her to come to his house next day.

41. On the 9th of July 2014, Unaisi came to his house and pulled him to the sitting room. She removed her clothes and so did he remove his clothes. She then started to kiss him and then had sexual intercourse. After that she asked him money to buy recharge card. Likewise, she came to his house on the 14 and 19th of July 2014 and has consensual sexual intercourse with him. She sent Saimoni on the 18th of July and 3rd of August 2014 informing the accused that she wanted to meet him on the following day. She came to his house on the 4th, 5th, 6th, 7th and 8th of August 2014. They had consensual sexual intercourse on the 4th, 5th, 6th, and 7th of August 2014. However, on the 8th of August 2014, she was having her menstruation, that prevented them to have sexual intercourse on that day.

42. The accused stated in his evidence that he had grog with Unaisi at Seva's house in the evening of 8th of August 2014. His wife came and asked him to go home. At home, his wife asked him what he was doing with Unaisi. She had heard stories from the villagers. The accused had then apologized to her for what he had been doing with Unaisi. Unaisi also came and apologized to his wife. They went to see Unaisi's parent on the 10th of August 2014 and extended his apology to them.

[11] The appellant had called his wife, Maca Kayaga who had described how she encountered the appellant and the complainant having grog and what happened thereafter.

'.... She said that she went to Seva's place to bring the accused back home in the night on 8th of August 2014. He was drinking grog with Unaisi. She asked the accused whether he was having an affair with Unaisi. He admitted that he

had sex with Unaisi and sought apology from her. She had forgiven him as he admitted the allegation. Sometimes later, Unaisi came to her and sought her apology. She cried. Maca had forgiven both of them. On the 10th of August 2014, Unaisi came and requested her to come and meet her parent with the accused. She went to meet her parent with the accused and told them what the accused and Unaisi had been doing. Accused sought forgiveness from her parent.

[12] The complainant had earlier admitted that incident regarding the grog session and the appellant and his wife meeting the complainant's parents but had denied that she had sought forgiveness from the appellant's wife.

> *'38. Unaisi said that she went to have grog at Seva's place and the accused also joined later. The accused's wife came, then the accused went back with her. Sometimes later, the wife of the accused came and started to talk bad things about her family. Unaisi said the wife of the accused came to her aunt's house when she was there on the 10th of August 2014. The accused then called her on her mobile, not knowing that his wife was also there. Unaisi put the speaker of the phone on, letting the wife of the accused to hear what he was saying. She denies that she sought forgiveness from the wife of the accused. On the same night, the accused and his wife came to see her parents and told them about this incident. By that time, her mother had already known it.'*

[13] The appellant had called another witness named Maca Ravulo whose evidence was to the following effect.

> *'45 The third witness for the defence is Maca Ravulo. She recalls that in the month of July 2014, Unaisi came to see her. Unaisi told her that she was having sex with the accused and he was giving her money to buy cigarettes and Kava.*
>
> *46. During the cross-examination, she said that she did not see the accused was having sex with Unaisi, but had seen him giving her money.'*

[14] The last witness of the defence had been Saimoni Naivalu. He had explained in his evidence that Unaisi asked him to convey messages to the accused on the 8, 13, 18 of July and 03 August 2014.

[15] The learned trial judge's reasons for agreeing with the assessors are given in the judgment in paragraph 5.

> *'The prosecution and the defence have agreed in the agreed facts that the victim came to the house of the accused to drop the lunch box of the accused's son on 9th, 19th of July 2014 and 4th, 5th, 6th, 7th, of August 2104 respectively. However, the accused in his evidence stated that the victim came*

to his house by her own and made plans prior to make few of such visits through Saimoni. Moreover, the prosecution and the defence have agreed that the accused and the victim had sexual intercourse on the 8th of August 2014 at the house of the accused. In contrast, the accused in his evidence said that he did not have sexual intercourse with the victim on the 8th of August 2014 as she was having her menstruation. I accordingly find the evidence of the accused was not consistence with the agreed fact tendered by the parties. Therefore, I do not find the evidence of the accused as truthful and credible. Moreover, I find the evidence adduced by the defence failed to make any reasonable doubt in the prosecution case.

[16] The learned trial judge had directed the assessors more or less on the same lines in paragraphs 59 of the summing-up.

01st ground of appeal

[17] The appellant contends that the learned trial judge had, however, not considered the opportunities the complainant had in reporting acts of rape earlier and her failure to do so giving rise to the conclusion that those acts were consensual. According to the appellant when the complainant went to get her injection she was alone and the police station was about 150 meters away and she had no reason to fear. She had admitted in evidence that she knew that he police could protect her under the law.

[18] The state has brought to the notice of court **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where the guidelines were suggested on how to deal with a delayed complaint. It is clear that the complainant had made the first complaint of rape after the 08th occasion where previous acts had happened within a period of one month. It was held in ***Serelevu***:

> '[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).

[19] It does appear that the trial judge had not addressed the assessors or himself on whether (i) the complaint had been made at the first available opportunity and (ii) there was an explanation for the delay; an explanation which was rational, reasonable and acceptable. However, the learned trial judge cannot be faulted for not following

Serelevu, for it was decided in October 2018 and the trial in this case had been concluded in January/February 2017. Nevertheless, the Court of Appeal now has to evaluate the case in the light of its own decision in ***Serelevu***.

[20] Therefore, whether the complainant's evidence can withstand the totality of circumstances test formulated in ***Serelevu*** is a question of mixed law and facts. In the circumstances, though I am not convinced that there is a reasonable prospect of success in the appellant's appeal at this stage without the benefit of the complete appeal record, I am inclined to grant leave to appeal so that the full court could consider this aspect fully at the appeal hearing.

02nd ground of appeal

[21] The appellant submits that the complainant never used the opportunities available to her to make a complaint but kept going to the appellant's house on eight occasions because he allegedly continued to call her and she had to drop the appellant's lunch box (vide paragraph 37 of the summing-up), only to be raped by the appellant over and again. The trial judge had pointed out to the assessors in paragraph 31 of the summing-up and directed himself in paragraph 6 of the judgment on the excuse given by the complainant why she did not complain and continued to go to his house *i.e.* due to fear and considered her explanation to be probable.

[22] The state supports the finding of credibility by the assessors and the trial judge by referring to **Deo v State** [2003] FJCA 20; AAU0015.2000S & AAU0016.2000S (16 May 2003) where the circumstances under which the confessions were obtained was challenged under 1998 Constitution, it was held

> *'These are trenchant findings on credibility. It is trite to say that appellate courts are very reluctant to interfere with findings on credibility by the Judge who heard and saw the witnesses. We have reviewed the evidence and are satisfied there was ample evidence upon which the Chief Justice could rely and from which he could draw the inferences he did. We therefore reject the challenge to his finding that the confessions were voluntary and, subject to other challenges, should be admitted in evidence.*

[23] Thus, the Court of Appeal is not debarred from reviewing the evidence in order to be satisfied that there was sufficient evidence to draw the inferences at the trial now being challenged in appeal. The evidence would include not only the prosecution evidence but also the defense evidence.

[24] However, this ground of appeal is not completely independent of the first ground of appeal and could be considered in the broad discussion under the first ground of appeal.

03rd ground of appeal

[25] The appellant argues that the trial judge had merely read the evidence of the defense witnesses in paragraph 43-47 of the summing-up to the assessors but not directed them to consider whether they would raise a reasonable doubt on the issue of lack of consent on the part of the complainant. However, it appears that the trial judge had addressed the assessors on how to act in the face of defense evidence in paragraphs 57-61 and in particular at paragraph 58 and 60 of the summing-up.

> *'However, the accused person decided to give evidence and also to call witnesses on his behalf. You must then take what the accused person and his respective witnesses adduced in evidence into account when considering the issues of fact which you are determining.*
>
> *'It is for you to decide whether you believe the evidence of the accused and their witnesses. If you considered that the account given by the defence through the evidence is or may be true, then the accused must be acquitted.*

[26] The appellant complains that the judgment does not reflect that the trial judge had considered the same issue. The learned trial judge had considered the defense evidence in paragraph 5 of the judgment but not specifically said why he found the evidence adduced by the defense as having failed to raise a reasonable doubt. One has to then look at the summing-up which I have quoted earlier.

[27] I made the following observations in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure Act. I reiterated those sentiments in **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)

> *'[9] A 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. 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). In fact, it was stated in* ***Kumar v State*** *[2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal*

[28] I am not convinced that the third ground of appeal has a reasonable prospect of success.

Order

1. Leave to appeal against conviction is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL