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

CRIMINAL APPEAL NO.AAU 0135 of 2019
[In the High Court at Lautoka Case No. HAC 196 of 2015]

BETWEEN	:	**LAISIASA KURINAQAU**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. M. Fesaitu for the Appellant**	
	:	**Mr. R. Kumar for the Respondent**	
Date of Hearing	:	**15 January 2021**	
Date of Ruling	:	**18 January 2021**	

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of rape 207(1) and (2) (a) and (3) of the Crimes Act, 2009, one representative count of rape 207(1) and (2) (a) and (3) of the Crimes Act, 2009 and one representative count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed at Sigatoka in the Western Division. The victim was 08 years old and the appellant was 51 years of age at the time of the commission of the offences. They were related to each other.

[2] The information read as follows.

COUNT ONE

Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

LAISIASA KURINAQAU, *on the 13th of November, 2015, at Sigatoka in the Western Division penetrated the vagina of "**KL**" an 8 year old child with his penis.*

COUNT TWO
REPRESENTATIVE COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

LAISIASA KURINAQAU, *between the 1st day of September and the 13th day of November, 2015, at Sigatoka in the Western Division penetrated the vagina of "**KL**" an 8 year old child with his tongue.*

COUNT THREE
REPRESENTATIVE COUNT
Statement of Offence

INDECENT ASSAULT: *Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

LAISIASA KURINAQAU, *between the 1st day of September and the 13th of November, 2015, at Sigatoka in the Western Division unlawfully and indecently assaulted "**KL**" an 8 year old child by touching her vagina.*

[3] The brief facts as could be gathered from the sentencing order are as follows.

"2. The brief facts were as follows:

On Friday 13th November, 2015 the victim who was 8 years of age was playing with her friends in the village when the accused came and grabbed her and forcefully took her to his house.

3. Inside his house the accused cello taped the victim's mouth and tied her hands with a rope, after removing her clothes the accused inserted his penis into her vagina. At this time the accused also touched the victim's vagina. As a result of what the accused did the victim was scared, felt lonely and started feeling pain.

4. The victim did not tell anyone because the accused had threatened her if she told anyone about what he had done to her he will do it again. Thereafter on a Monday the victim was again playing with her friends, when she saw the accused she ran, but he was able to grab her and take her to his house.

5. Inside his house the accused cello taped the victim's mouth, removed her clothes and inserted his tongue into the victim's vagina. In November, 2015 the accused had also touched the victim's vagina and inserted his tongue into the victim's vagina over a period of three days.

6. The matter was reported to the police, the accused was caution interviewed he admitted committing the offences as alleged.

[4] At the conclusion of the summing-up on 08 July 2019 the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant on all counts and sentenced him on 26 July 2019 on all three counts to an aggregate sentence of 17 years and 09 months of imprisonment with a non-parole period of 16 years.

[5] The appellant's timely application for leave to appeal against conviction and sentence had been filed on 30 August 2019. The Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence along with written submissions on 24 September 2020. The state had tendered some not so useful written submissions on 05 November 2020.

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

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

Conviction

1. *That the learned trial judge erred in law and in fact when he failed to direct the assessors and himself on the principle of recent complaint*

2. *That the learned trial judge erred in law and in fact when he convicted the Appellant when the evidence led by the State did not support the charge.*

Sentence

3. *The sentence imposed is harsh and excessive.*

01st ground of appeal

[9] The appellant argues that the complainant had told her sister Alisi about what the appellant had done to her as reflected at paragraph [47] of the summing-up. However, Alisi had not been called by the prosecution and the trial judge had not directed the assessors and himself as to how this 'recent complaint' evidence should be treated.

'47. When the complainant reached home she told her sister Alisi about what the accused had done to her. In November, 2015 the accused had sucked her private part and touched her private part for three days.

'50. The complainant agreed her sister Alisi had told her mum about what she had told her sister and her mum told the police.

[10] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court set down the law regarding recent complaint evidence as follows.

*'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*

*[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'

[11] Since the prosecution had not called Alisi to speak to what the complainant had told her the latter's evidence as referred to in paragraphs 47 and 50 of the summing-up cannot be regarded as recent complaint evidence in terms of ***Raj v State*** (supra).

[12] Goundar J in **State v Navacalagilagi** [2009] FJHC 48; HAC165.2007 (17 February 2009) stated:

"If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused."

[13] Therefore, it appears that the trial judge should have directed the assessors to disregard that piece of evidence to avoid any prejudice to the appellant as a result of the assessors having heard it from the complainant and from the trial judge in the summing-up. The judge had apparently failed to do.

[14] I think to decide the correct approach that should be taken by the appellate court in dealing with this kind of scenario it is useful to see how the courts have dealt with the following areas.

Bad character evidence

[15] In **Mohan v State** [2015] FJCA 155; AAU103.2011 (3 December 2015) affirmed by the Supreme Court in **King v State** [2019] FJSC 11; CAV0002.2016 (21 May 2019) the Court of Appeal considered a complaint where bad character evidence had crept in through the cautioned interview and remarked

> *22. Due to this prejudicial inadmissible evidence of bad character pertaining to both the appellants was included. This has caused a miscarriage of justice in this case.*
>
> *23. However there was ample evidence in this case on all elements of the offence which could have led reasonable assessors to convict the Appellants.*
>
> *24. I hold that although there was a miscarriage of justice by the inclusion of bad character evidence, when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice. Therefore I hold that this falls within the proviso to Section 23 (1)(a) of the Court of Appeal Act. Hence I uphold the conviction*

Evidence of an uncharged act

[16] **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) the Court of Appeal dealt with a complaint of the prosecution having led evidence of an uncharged act as follows.

> *'[35] Once again the appellant complains of an alleged non-direction by the trial Judge with regard to an uncharged act on the evidence of his having escaped from Ba Police Station during interview. Admittedly, this had not been raised by the counsel for the appellant when the trial Judge asked for any redirections. The appellant relies on **Senikarawa v State** AAU0005 of 2004 S:*

24 March 2006 [2006] FJCA 25 *and* ***Vesikula v State*** *AAU0070 of 2014: 23 October 2018* [2018] FJCA 176 *in support of his argument. The litmus test for leading evidence of an uncharged act is whether the probative value of the evidence outweighs the prejudice to the accused.*

First time dock identification

[16] On a complaint of the irregularity of a first time dock identification the following test was formulated in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) following **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018)

> '[36] *Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23 (1) of the Court of Appeal Act would apply and appeal would be dismissed*

[17] The same or similar two-tiered test may be suitable to the appellant's complaint under of this ground of appeal.. **Firstly,** the appellate court would consider ignoring the evidence on so-called recent complaint evidence whether there was sufficient evidence on which the assessors could express the opinion that the appellant was guilty and on which the trial judge could find him guilty (*i.e.* quantity/sufficiency of the evidence available sans the impugned item of evidence). **Secondly,** the court would see whether the assessors and the judge would have found the appellant guilty even in the absence of so-called recent complaint evidence (*i.e.* whether the quality/credibility of the available evidence without the impugned evidence is capable of proving the case against the accused beyond reasonable doubt).

[18] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Ravawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[19] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaivum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[20] Regarding the non-direction of the trial judge to the assessors to disregard the alleged recent complaint evidence the proper test for the appellate court is laid down in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice****. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the* Court of Appeal Act.
>
> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in* ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** [1955] NZLR 711 *at page 713:*
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> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.****"*
>
> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words*

the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

*"The application of the **proviso to section 23** (1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[21] Even disregarding the alleged recent complaint evidence there had been ample evidence in the form of direct evidence of the complainant, the admissions in the appellant's cautioned interview and medical evidence led by the prosecution. Therefore, firstly, there had sufficient evidence on which the assessors could express the opinion that the appellant was guilty and on which the trial judge could find him guilty; secondly, the assessors and the judge would have found the appellant guilty beyond reasonable doubt in the absence of so-called recent complaint evidence.

[22] With regard to the trial judge's omission to direct the assessors and himself to disregard the alleged recent complaint evidence, though it may have caused miscarriage of justice it certainly had not caused a substantial miscarriage of justice within the meaning of the proviso to section 23(1), as on the whole of the facts, reasonable assessors, after being properly directed, would without doubt have convicted the appellant or put another way this court can be satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty.

[23] In any event the appellant's counsel should have sought redirections in respect of this complaint now being made on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). The failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[24] Therefore, there is no reasonable prospect of success of the first ground of appeal.

02nd ground of appeal

[25] The appellant's complaint is that the prosecution had not led evidence connecting the dates of the offences as set out in the charges and cites paragraphs 41 and 45 of the summing-up where the trial judge had referred to the dates as *'....on a Friday in 2015..'* and *'....on Monday thereafter...'*. However, it appears from paragraph 53 of the summing-up that PW2 had witnessed one incident on 13 November 2015 inside the appellant's house. The complainant had been examined medically on 17 November 2015 and the appellant had been interviewed on 19 November 2015. Nevertheless, it is clear from the victim's evidence that at least on one occasion, if not more on or prior to the last day set out in the information *i.e.* 13 November 2015 (as the victim had seen PW2 at the doorstep of the appellant's house where the appellant had taken her) the appellant had both penetrated her vagina with his penis, sucked and touched her private part.

[26] The appellant's counsel does not seem to have raised any issue at the trial including in the closing speech regarding the evidence led by the prosecution not covering the times mentioned in the information.

[27] I think the principles relating to an allegation of a defective charge set out in **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) by the Supreme Court as to how to assess the weight of it by the appellate court, could be safely applied to the appellant's complaint as well even if the prosecution evidence had not conformed to the exact dates in the information.

> *'[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. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

[28] The appellant seems to have had a clear understanding of the charges faced by him from the time he made his cautioned interview. There is nothing to indicate that his counsel had any difficulty in formulating his defense in the face of the evidence led by the prosecution. The appellant had denied the allegations altogether in cross-examination of prosecution witnesses but remained silent. Therefore, any shortcoming in prosecution evidence regarding the exact dates set out in the information would not have misled or prejudiced the appellant's case.

[29] I do not find any reasonable prospect of success in appeal for the second ground of appeal.

03rd ground of appeal (sentence)

[30] The appellant's complaint is that the sentence is harsh and excessive because the trial judge had not given adequate discount to his advanced age, being a first offender and for migratory factors.

[31] The trial judge had taken the sentencing tariff in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) for juvenile rape *i.e.* between 11-20 years of imprisonment in sentencing.

[32] In **Raju v State** [2020] FJCA 248; AAU0055.2018 (24 November 2020) I had the occasion to consider, in a slightly different context (*i.e.* in the matter of imposition of a non-parole period) the applicability of the common law principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released. I considered **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002) where the accused was a man of 64 years and **State v Daunakamakamu** - Sentence [2018] FJHC 297; HAC137.2017 (18 April 2018) where the accused was 83 years of age in this regard and stated

> *'[47] The common law principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released, should now be considered in the context of completely different sentencing principles and guideline judgments currently being applied on sentencing in child rape cases.*

[33] The appellant has not demonstrated any statutory provision or binding judicial authority supportive of his attempt to apply the same common law principle to his case. The appellant was 51 years of age when the offending took place and would have been aged only 55 at the time of sentencing. Therefore, I do not think that he deserved to be treated leniently and get the benefit of the above common law principle even if it is still applicable as part of the sentencing regime in Fiji.

[34] The trial judge had not considered other factors including his age urged on behalf of the appellant other than his being a first offender as the rest of them were personal circumstances [vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] and reduced 01 year from the sentence for his record of 'no previous' convictions. I am not convinced that the appellant should have been treated as a first offender given that the allegation of sexual abuse was not just a single act but consisted of several acts over a period of time.

[35] The trial judge had considered *inter alia* **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) where the Supreme Court had come out with a long non-exhaustive list of factors to be considered in child rape cases. Many of such features are present in this case.

[36] Therefore, the appellant has failed to demonstrate a sentencing error having a reasonable prospect of success under the sole ground of appeal against sentence to deserve leave to appeal.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL