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

CRIMINAL APPEAL NO.AAU 113 of 2018
[In the High Court at Lautoka Case No. HAC 125 of 2017]

BETWEEN	**:**	**ATAMU PENETE**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. J. Prasad for the Respondent**
Date of Hearing	**:**	**25 March 2021**
Date of Ruling	**:**	**26 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of attempted rape contrary to section 208 of the Crimes Act, 2009 and three counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed on 22 April 2017 at Lautoka in the Western Division. The victim was 14 years of age (year 09 student) and the appellant, who was her biological father, was 44 years old at the time of the incidents.

[2] The information read as follows:

*'**FIRST COUNT**'*

Statement of Offence

***ATTEMPTED RAPE**: Contrary to section 208 of the Crimes Act 2009.*

Particulars of Offence

ATAMU PENETE *on the 22nd day of April, 2017, at Lautoka in the Western Division, attempted to have carnal knowledge of "**NP**" without her consent.*

*'**SECOND COUNT**'*

Statement of Offence

***RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.*

Particulars of Offence

ATAMU PENETE *on the 27th day of April, 2017, at Lautoka in the Western Division, penetrated the vagina of "**NP**" with his penis, without her consent.*

*'**THIRD COUNT**'*

Statement of Offence

***RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.*

Particulars of Offence

ATAMU PENETE *on the 12th day of May, 2017, at Lautoka in the Western Division, penetrated the vagina of "**NP**" with his penis, without her consent.*

*'**FOURTH COUNT**'*

Statement of Offence

***RAPE**: Contrary to section 207 (1) & (2) (a) of the Crimes Act 2009.*

Particulars of Offence

ATAMU PENETE *on the 20th day of May, 2017, at Lautoka in the Western Division, penetrated the vagina of "**NP**" with his penis, without her consent.*

[3] At the conclusion of the summing-up on 20 July 2018, the assessors' unanimous opinion was that the appellant was guilty of all charges. The learned trial judge had agreed with the assessors in his judgment delivered on 23 July 2018, convicted the appellant of all counts and on 13 August 2018 imposed an aggregate sentence of 13 years, 09 months and 15 days of imprisonment with a non-parole period of 12 years.

[4] The appellant had in person tendered a timely notice of appeal against conviction and sentence on 30 August 2018. The appellant had filed an application to abandon his

sentence appeal on 22 September 2020. The Legal Aid Commission had filed amended notice of appeal and written submissions only against conviction on 14 October 2020. The state had tendered its written submissions on 10 November 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), **Chaudhry 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.

[6] The grounds of appeal urged on behalf of the appellant are as follows:

> ***Conviction***
>
> ***Ground 1***
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> *THAT the Learned Trial Judge had erred in law and in having not independently assessed the medical evidence, having done so, would have entertained a reasonable doubt as to the elements of penetration.*
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> ***Ground 2***
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> *THAT the learned trial judge had erred in law having not assessed the delay in the matter being reported that could have affected the credibility of the complainant.*

[7] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows:

> 2. *The victim is the daughter of the accused, in the year 2017 she was 14 years of age a year 9 student.*
>
> 3. *On 22 April, 2017 the complainant was at home with her siblings and her father, the accused. During the day she asked her father if she could go and*

watch the inter zone meet at Churchill Park. Her father replied that she is to go first in the bedroom with him, she obliged.

4. *In the bedroom she was shocked when her father locked the door and told her in an aggressive tone to lie on the bed. When the victim was on the bed her father removed her pants and panty and also tried to kiss her. She pushed him away.*

5. *After this, she wore her pants and panty and went into the kitchen. The victim got scared when her father did this to her. She did not tell anyone because she was told by her father not to tell anyone about what he had done to her. The complainant's siblings were outside the house at this time.*

6. *On 27th April in the afternoon the victim was in the kitchen cooking, the accused came and told her that he wanted to have sex with her. She refused, at this time the accused pulled the victim's hand and took her to his bedroom. In the bedroom he locked the door, told her to lie on the bed, forcefully removed her pants and panty and inserted his penis into her vagina. He covered her eyes with one of her mother's clothes. The sexual intercourse continued for about 5 minutes. When she got up she saw the bed sheet was wet. The victim left the bedroom and had her shower.*

7. *The victim was frustrated she did not tell anyone about what the accused had done to her. He told her if she told anyone both will go to prison so she did not tell anyone.*

8. *In respect of the third incident, in the afternoon of 12th May, whilst cooking her father came and punched her on the left shoulder because she had cooked food in a small pot and it was not enough.*

9. *According to the victim her siblings were watching a movie. After dinner her father came and told her that he wanted to have sexual intercourse with her. The victim refused, upon hearing this, her father pulled her hair and took her into his bedroom. She was crying at this time.*

10. *Inside the bedroom her father took off her clothes and told her to lie on the bed and then inserted his penis into her vagina for about 10 minutes she was frustrated and fearful of what the accused was doing to her. She did not shout for help because he told her not to shout or tell anybody otherwise both will be in trouble. The victim did not tell anyone because she was afraid her father would do something to her.*

11. *Finally, on 20th May, at about 5.45am when the victim returned after dropping her mother at the road side so that her mother could go to work the accused was in the sitting room. The complainant went to her bedroom but there was no mattress so she went to her parent's bedroom and slept there.*

12. *When she woke up, she was shocked to see her father sleeping beside her. At this time he forcefully removed the victim's pants and panty and inserted his penis into her vagina for about 10 minutes.*

13. *After what her father had done, the victim wanted to run away from home she was really frustrated and afraid. At this time the victim heard her siblings calling her from outside the bedroom. Her father told her not to respond but to wait inside the room. After removing the louver blades of the bedroom her father jumped out of the window.*

14. *Her father had gone outside to check if there was any one around. After sometime he came into the bedroom to tell the victim to leave the room. The victim did not tell anyone about what her father had done to her since she was scared. He had told her not to tell anyone and whatever had happened was only to be kept between the two.*

15. *On 3 June, 2017 the complainant's grandmother Titilia Nasokia who lived close by came and asked the victim why the accused had jumped out of the window. She told her grandmother whatever she had told the court. Upon hearing his, her grandmother informed the complainant's mother.*

16. *On 4th June, the matter was reported to the police by the victim's mother, the victim was medically examined.*

17. *On all the above occasions the victim did not consent to the unlawful sexual activities of the accused. The mother of the victim was not at home when the above offences were committed on the victim.*

[8] In addition to the complainant and her grandmother, her own mother and the doctor who had examined her had given evidence for the prosecution. The appellant also had given evidence and denied all allegations. He had claimed that he was not on good terms with his mother-in-law (*i.e.* complainant's grandmother) as she had been telling his children that he was a bad person and it is the mother-in-law who had instigated the allegations against him.

01st ground of appeal

[9] The appellant's argument is based on the medical examination of the complainant performed on 04 June 2017 which had revealed that that the complainant's hymen was not intact and the injury was more than 03 days old and consistent with the history of acts of sexual intercourse. However, the doctor had not been able to ascertain as to how old the bruises found on the thigh and vaginal area of the complainant were. The appellant argues that the complainant had not spoken to any

physical contact on her thigh and vaginal area and therefore the medical findings did not support the complainant's evidence and the trial judge had not made any finding on this aspect in the judgment. If he had done so, according to the appellant, the judge would have entertained a reasonable doubt on the element of penetration.

[10] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal regarding the trial judge's role in trial proceedings with assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159;AAU0142 of 2017 (10 September 2020) followed by a few other rulings. My conclusions were subsequently summarized in **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows:

> "*What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court is supported by evidence so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]."*
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> *"…… a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge."*
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> *"This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to*

*offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)."*

[11] The trial judge had summed-up to the assessors on medical evidence as follows:

> *80. The final prosecution witness was Dr. Sainimili Leba who graduated with an MBBS degree from the Fiji School of Medicine in the year 2014. After graduation the witness completed her internship at the Lautoka Hospital for 1 year.*
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> *81. The doctor was able to recall examining the complainant on 4th June, at the Lautoka Hospital. The Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.*
>
> *82. The initial impression of the patient was that she looked sad, was crying but not in respiratory distress, she did not want to talk preferred the mum to convey the story of the incident.*
>
> *83. The specific medical findings of the doctor were:*
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> *(a) Vaginal examination the hymen was not intact;*
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> *(b) No vaginal bleeding;*
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> *(c) No vaginal discharge;*
>
> *(d) No cervical excitation tenderness; and*
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> *(e) Bruises around vaginal area and thigh.*
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> *84. The professional opinion of the doctor was that the age of the injury the hymen was not intact appeared to be more than 3 days old.*
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> *85. The doctor further stated if the penetration of the vagina happened on 20th May her opinion was consistent with her medical findings since she did not see any vaginal bleeding or vaginal discharge. The hymen not being intact could be by blunt trauma such as a penis penetrating the vagina.*
>
> *86. The bruises seen on the vaginal area and thigh of the complainant were old injury but the doctor could not say how old they were. According to the doctor the history related to her was consistent with her findings.*
>
> *87. In cross examination the doctor agreed hymen not intact meant the patient was sexually active having sexual intercourse. In respect of the bruises*

seen around the vaginal area the doctor stated it could have been caused by blunt trauma or force or it could have been caused by anything.

[12] Having directed himself according to the summing-up, the trial judge had referred to medical once again as follows in his judgment:

> *26. The final prosecution witness was Dr. Sainimili Leba she was able to recall examining the complainant on 4th June 2017, at the Lautoka Hospital. The Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.*
>
> *27. The professional opinion of the doctor was that the hymen was not intact which appeared to be more than 3 days old.*
>
> *28. The doctor further stated if the penetration of the vagina happened on 20th May her opinion was consistent with her medical findings since she did not see any vaginal bleeding or vaginal discharge. The hymen not being intact could be by blunt trauma such as a penis penetrating the vagina.*
>
> *29. The bruises seen on the vaginal area and thigh of the complainant were old injury but the doctor could not say how old they were. According to the doctor the history related to her was consistent with her findings.*
>
> *30. The evidence of the doctor is also accepted by this court as reliable her findings are consistent with the examination she had carried out of the complainant.*

[13] Therefore, the trial judge had in fact considered the doctor's evidence on bruises seen on the vaginal area and thigh of the complainant. Thus, the doctor's finding about bruises seen on the vaginal area and thigh of the complainant were that they were old injuries but the doctor could not say how old they were. This evidence does not in any way discredit the complainant's evidence on sexual abuses that had begun on 27 April 2017 and lasted till 20 May 2017. On the contrary, medical evidence had supported previous acts of sexual intercourse. Bruises seen on the vaginal area and thigh of the complainant had nothing to do with penetration of her vagina. Vaginal penetration had been separately and positively identified by medical evidence. How the medical evidence on bruises seen on the vaginal area and thigh of the complainant could cast doubt on the trial judge's following finding cannot be fathomed:

> *'32. I accept the evidence of the complainant as truthful and reliable. She struck me as an honest person, her demeanour showed a person of strong*

character who could not be influenced or coached or forced by anyone into something against her will.'

[14] In any event, the complainant's evidence when believed could stand on its own and sufficient to establish all charges against the appellant even without the rest of the prosecution evidence including medical evidence as no corroboration of her evidence is required in law. Both the assessors and the trial judge had not entertained any doubts of the complainant's evidence.

[15] Therefore, in my view, there is absolutely no prospect of success of this ground of appeal succeeding in appeal.

02nd ground of appeal

[16] The incidents of sexual abuses had come to light when the complainant's grandmother had questioned the complainant on 03 June 2018 having seen the appellant jumping out of the room through the window and observed the complainant looking unhappy and pale and her school work being affected. The appellant complains that the trial judge had not made any reference or assessed the delay in the complainant bringing the matter to the attention of the grandmother.

[17] The trial judge had directed himself as per the summing-up. The reasons for the complainant not reporting instances of sexual abuse in the form of rape relating to 02nd to 04th charges as testified by the complainant are at paragraphs 50, 53 and 57 of the summing-up. However, it appears that as soon as she got an opportunity with the grandmother probing the appellant having jumped out of the window she revealed the sexual abuses by the appellant. The same was related to the mother and the matter was reported to the police on the following day *i.e.* 04 June 2018 by the mother.

[18] It does appear from the summing-up that the appellant had sought to discredit the complainant's evidence on the basis that she had not reported the incidents of rape to the mother or siblings promptly because no such incidents happened.

[19] The appellant relies on **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) 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:-
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> *'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:
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> *'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.'*

[20] The trial judge had addressed the assessors on this aspect of the case at paragraphs 70 – 74 of the summing-up and left it with the assessors to determine what weight they would attach to the delay in complaining in considering the complainant's

consistency, reliability and credibility in the light of her explanations (see paragraphs 71 and 74). The fact remains that she disclosed the incidents of rape to the grandmother at the first opportunity made available to her. Although, the trial judge had not followed ***Serelevu*** directions as an incantation, the judge had clearly asked the assessors to consider to what extent the failure of the complainant to report sexual abuses immediately to the mother would affect her evidence in the light of her explanation for not reporting and prompt disclosure to the grandmother.

[21] Examining the totality of evidence and particularly, given the fact that the complainant had to continue to live with the appellant in the same house and her frustration built up over a period of time after facing repeated sexual abuses culminating her wanting to run away from home, it was not surprising that she disclosed them without hesitation to the grandmother who was the first person to probe the appellant's conduct and the complainant's demeanor. It looks as if the complainant was waiting for an opportunity to relieve herself of the mental burden of keeping the appellant's sexual transgressions to herself so that long.

[22] I entertain no doubt about the complainant's explanation for not reporting the incidents to anyone earlier and also accept that she had done so at the first reasonably available opportunity.

[23] Therefore, there is no reasonable prospect of success at all of the second ground of appeal also succeeding in appeal.

[24] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is reasonable or can be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..**Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based**…….'*

[25] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[26] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is **whether the trial judge could have reasonably convicted on the evidence before him** (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[27] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL