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

CRIMINAL APPEAL NO.AAU 159 of 2020
[In the High Court at Suva Case No. HAC 34 of 2019]

BETWEEN : **SUTUWETI TUISAVURA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Ms. U. Tamanikayaroi for the Respondent**

Date of Hearing : **06 December 2022**

Date of Ruling : **08 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva and found guilty of two counts of rape [section 207(1) and (2)(b)] and one count of sexual assault [section 210(1)(a)] committed at Moala in the Central Division on 17 June 2016.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with their opinion and convicted the appellant as charged. The appellant had been sentenced on 26 October 2020 to an aggregate sentence of 11 years 07 months and 14 days imprisonment with a non-parole period of after 8 years.

[3] The appellant's appeal against conviction and sentence is timely. However, he had applied to abandon his sentence appeal by filing a Form 3 under Rule 39 on 15 February 2022.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The case against the appellant was based on the evidence of the victim (aged 15), her aunt Elenoa Salaiwalu (PW3) and PW2 - Isireli Taukeinikoro Vulawale. The appellant, aged 40 was the sole witness for the defence. Victim's testimony had been summarised by the trial judge as follows in the sentencing order.

> *'3. ………….. On 17 June 2016 you encountered the victim and her boyfriend in the village public convenience. It was late in the night and you told the victim's boyfriend to go home. You lied to the victim that you will inform her grandparents that she was caught in the public convenience with her boyfriend. Then you held her by her wrist and took her to a vacant house. You threatened the victim to be quiet. You touched her breasts while she was crying. You pulled down her pants and started touching her vagina. You inserted your index finger into her vagina without the consent of the victim. Subsequently you inserted your penis into her vagina without her consent. The victim was frightened and was in pain. You threatened her that you will do something that she has never seen in her life if she tells someone about the incident.'*

[6] The appellant's testimony had been summarised in the summing-up as follows.

> *53. …………he went to drink grog and was returning home at around 10.30 pm. He said when he was going pass the public convenience, he heard a noise like someone rubbing a flip flop on a concrete surface. He stated then he turned on the flash in his phone to check who was inside the public convenience. …….he was surprised to see the complainant and Sireli inside the public convenience.*

54. ………..the complainant started crying and asked him if she could wear her sulu. He also said that the complainant pleaded him not to take her to her grandfather saying that the grandfather would beat her to death. <u>According to the Accused he had then told the complainant and Sireli to go home. He further said that when the complainant and Sireli left, he also went home.'</u>

[7] However, PW2- Isireli Taukeinikoro Vulawale had said in his evidence that the complainant was studying at his school and they had a relationship. On 17 June 2016 after watching a movie he went to the village public convenience with the complainant. He stated that when he was talking with the complainant inside the public convenience, the appellant shone a torch on them and had told him to go home. He got scared and left the public convenience to go home. However, when he turned back, he had seen the appellant pulling the complainant's hand. He had denied that he and the victim left together to return home but insisted that when he turned back, he saw the appellant still with the complainant. He, however, admitted that there were stories about him and the complainant circulating in the village around August 2018.

[8] Elenoa Salaiwalu's evidence was that on 24 August 2018 the appellant came to work as a labourer at her husband's younger brother's house which was under construction and she asked the victim to prepare afternoon tea for them. After preparing tea, the victim had come and informed her about what the appellant did to her in 2016.

[9] The appellant had urged the following grounds of appeal against conviction.

<u>Conviction:</u>

<u>Ground 1</u>

<u>THAT</u> the appellant's case is not adequately and objectively summed up in a balance and fair manner resulting in a miscarriage of justice.

<u>Ground 2</u>

<u>THAT</u> the directions on the burden and standard of proof is inadequate in terms of the liberato directions resulting in a miscarriage of justice to the appellant.

<u>Ground 3</u>

<u>THAT</u> the Learned Judge had erred by accepting the delay in the making of the complaint, when the reasons put forth from the evidence and the circumstances

supporting the delay are not satisfactory, resulting in the conviction being unreasonable.

Ground 01

[10] The gist of the complaint under this ground of appeal is that the trial judge had failed to place before the assessors the delay of reporting the incident which was a little over 02 years highlighting the appellant's explanation why the victim had failed to complain promptly as opposed to her explanation for the delay. His explanation according the counsel is that her failure to lodge a prompt complaint is due to the fact that by 2018 rumours started circulating in the village of the relationship between her and PW2 after he had complained to some wives of police officers of the incident relating to what he witnessed at the public convenience. The victim's desire to divert the attention of villagers from the rumours and possibly his complaint to those ladies made her lodge a false complaint in 2018.

[11] Though the complainant was scared, she finally decided to unfold the incident to her aunt on 24 August 2018 because the appellant started coming to her place when her uncle's house was being constructed and she got more scared of him. According to her, the appellants told her not to tell anyone about what happened and he will do something that she has never seen if she tells anyone about the incident. She did not tell anyone after she came home as she was scared that the appellant would do something to her again.

[12] Reading the summing-up or the judgment, I do not find the appellant having suggested to the victim or said in his own evidence, attributing the fabrication of a complaint against him 2018 to the alleged motive on the victim's part to save herself from the rumours. The case theory proposed by the appellant's counsel is not borne out by the evidence.

[13] The appellant had challenged the victim's explanation of living in fear of him till 2018 when she allegedly got even more scared by stating that she visited his house from 2016-2018 even after the alleged incident to borrow cloths from his wife and

daughter. However, she had denied that she visited his house regularly but admitted that she used to hang out with his daughter and would visit his house only when asked to bring something. However, it appears from the evidence of PW2 that in 2018 rumours started going round of his relationship with the victim in the village. The appellant on the other hand admitted that he lied to the victim that he would take her to the grandfather in that night because she was caught in the night alone with PW2. The trial judge had adequately put the appellant's position to the assessors with the apparent delay very much in focus and addressed himself on the issue of delay in great detail with the relevant law in mind in the judgment.

[14] It appears that a more plausible reason for her not to divulge the appellant's violation of her bodily integrity in 2016, would have been that if she had reported the matter then and there, invariably her relationship with PW2 also would have come to light which she was determined to prevent due to her fear of reprisals from the grandfather with whom she was living and schooling. The fear factor concerning the appellant may have been added reason.

<u>Ground 02</u>

[15] The appellant contends that the trial judge had failed to give a *Liberato* detection to the assessors.

[16] The trial judge had given the following directions. These have to be considered along with paragraphs 69-71.

> *'[66] ………….If you find the prosecution evidence is not truthful and or unreliable, then you must find the Accused not guilty of the charges. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether with that truthful and reliable evidence, the prosecution has proved the elements of each offence, beyond any reasonable doubt.*
>
> *[67] ……………..If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty of the charges.*
>
> *68. However, I must caution you that even if you reject the evidence of the Accused as not truthful and also unreliable that does not mean the prosecution*

case is automatically proved. You must still consider whether the evidence adduced by the prosecution proved all the elements in respect of each offence, beyond reasonable doubt.'

[17] The full court dealt with in detail a similar complaint in **Naidu v State** AAU 0158 of 2016 (24 November 2022). In **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the majority in the High Court held that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."*. In **Johnson v Western Australia** (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA said in relation to ***Liberato*** as a template for the direction that a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

[18] Therefore, the full court in ***Naidu*** preferred the modified ***Liberato*** directions as formulated in **Anderson** (2001) 127 A Crim R 116 at 121 in a situation particularly, involving a 'word against word' scenario. The appellant complains that modified ***Liberato*** direction **(ii)** *i.e.* if the assessors do not accept the appellant's evidence but they consider that it might be true, still they must acquit, had not been given resulting in a miscarriage of justice.

[19] In the first place, the appellant's case is not a 'word against word' situation, for PW2 corroborates part of the victim's evidence. Secondly, given all the directions at paragraphs 66-71 coupled with general directions on standard and burden of proof, I do not see how the assessors would have run away with the notion that that a preference for the evidence of the complainant suffices to establish guilt. Thus, no miscarriage of justice had ensued due to the absence of the modified ***Liberato*** direction **(ii).**

03rd ground of appeal

[20] The appellant submits that the reasons for the delay in reporting is unsatisfactory and may suggest fabrication and therefore, based on the victim's testimony the verdict of guilty is unreasonable.

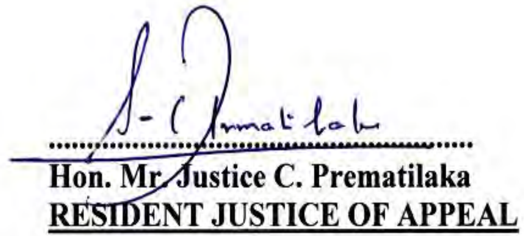
[21] The appellant has not explained that given the fact that rumours were circulating of the relationship and PW2 in the village, why she decided to implicate the appellant in allegations of rape and sexual abuse; in other words how her 'false' implication of the appellant was going to help her dispel those rumours. In other words, there does not appear to be causal theory between rumours and her complaint against the appellant. The appellant has not said that she was trying to take revenge on him by doing so, for he had apparently disclosed his encounter with the victim and PW2 at the public convenience to police wives. In fact, even a false allegation of rape and sexual abuse would have tarnished her own reputation greatly compared to that of her relationship with PW2. Would she have chosen a greater evil to wade off a much lesser evil by implication an innocent man, her own elderly relative?

[22] The trial judge had taken utmost care and almost devoted the entre judgment in analysing the issue relating to the belated complaint in the light of principles propounded **State v Serelevu** [2018] FJCA 163; AAU141 of 2014 (04 October 2018) and **Prasad v State** [2020] FJCA 101; AAU125 of 2016 (10 July 2020) and held that the delay in reporting did not affect the veracity of her evidence. Further, PW2's partially corroborative evidence of the victim puts her testimony beyond any reasonable doubt. In fact the defence had not proposed to the victim that the delay in reporting on her part constituted a false complaint.

[23] In my view, none of the grounds of appeal has a reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL