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

CRIMINAL APPEAL NO.AAU 036 of 2021
[In the High Court at Suva Case No. HAC 019 of 2020]

BETWEEN	:	**VAKANANUMI VUNIVESI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. W. T. Elo for the Respondent**
Date of Hearing	:	**28 June 2023**
Date of Ruling	:	**29 June 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Suva on three counts of rape spanning for 02 years of his step daughter aged 15 years. The charges are as follows:

'***First Count***

Statement of Offence

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

Particulars of Offence

VAKANANUMI VUNIVESI *between the 23rd day of November 2017 to the 13th day of January 2017 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.*

Second Count

Representative count

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.*

Particulars of Offence

VAKANANUMI VUNIVESI *between the first day of January 2018 to the 31st day of December 2018 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.*

Third Count

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.*

Particulars of Offence

VAKANANUMI VUNIVESI *the 15th day of November 2019 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.'*

[2] The assessors had expressed a unanimous opinion that the appellant was guilty of all three counts. Having agreed with the assessors' opinion, the trial judge had convicted him on all counts and sentenced the appellant on 19 February 2021 to an aggregate sentence of 17 years' imprisonment with a non-parole period of 15 years. The effective sentence were to be 15 years and 10 months with a non-parole period of 13 years and 10 months after deducting the remand period.

[3] The appellant had lodged in person an untimely appeal against conviction and sentence.

[4] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly

prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[6] The trial judge had summarized the facts in the sentencing order as follows:

> *2. You are the stepfather of the Complainant. The Complainant had been about 15 years of age in 2017 when the incident relating to the first count occurred. The first incident happened during the third term school holidays in the year 2017, when the Complainant's mother was not at home. You forced the Complainant to take off her clothes and you told her siblings to stay outside the house. The Complainant submitted to you as she was scared that you would assault her. You inserted your penis into her vagina without her consent and the Complainant had to bear the pain as it was hurting.*
>
> *3. Since then, you continued to rape the Complainant during the year 2018. When the Complainant returned home after school and when her mother was not at home, you had sexual intercourse with the Complainant without her consent in numerous occasions. The Complainant submitted to you due to fear.*
>
> *4. On a Monday in November 2019, you had sexual intercourse with the Complainant. You told her that you will again have sexual intercourse with her on the following Friday. The Complainant decided that she would not submit to you again and as a result she did not return home after school on that Friday. She stayed with her friends and on the following Thursday her mother came and took her home. On 15 November 2019 when she was at home, you observed a fading love bite on her neck. You got angry after seeing the love bite and started punching her. When her mother went to work you told her to undress and lie down. The Complainant was having a swollen face and body pains due to your assault. You inserted your penis into her vagina while the Complainant was crying in pain. The Complainant initially reported only about the assault to the Police. Later she confided to her mother about what she had gone through and a report was lodged in respect*

of the incidents of rape. The evidence revealed that you have treated the Complainant like your wife, and you had been jealous when you saw a fading love bite on her neck. According to the Complainant's evidence you had refrained the Complainant from going anywhere and you had wanted her to stay home always. In her words she said that you treated her like she was your wife.'

[7] The appellant had remained silent and not called any evidence on his behalf. He was defended by counsel at the trial. As per the admitted facts the appellant had admitted that he had sexual intercourse with the complainant on 15 November 2019. According to the trial judge the main issue in the case in respect of all three counts was consent.

[8] The grounds of appeal urged by the appellant are as follows:

Conviction:

Ground 1

THAT the Learned Trial Judge erred in law and in fact in misdirecting the lay assessors in a late complaint does not necessarily signify a false complaint. Similarly an immediate complaint does not necessarily demonstrate a true complaint. This crucial issues had caused unfairness and rendering the assessors in finding him guilty after the course of trial.

Ground 2

THAT the Learned Trial Judge erred in law by failing to take into account the evidence and or the materials contained in question and answer no of caution interview. As specifically since the statement of the appellant was marked and served as prosecution exhibit number.

Ground 3

THAT thus the Trial Judge erred in law and in fact in not adequately evaluating the defence evidence of consent before the assessors and the failure of defence counsel. Lack of proper examinations to the victim regarding the admitted facts of Count 3 had fully amounted to a flagrantly incompetent advocacy.

Ground 4

THAT however, the Learned Judge mistook the facts of complaint when she forgiven appellant and feels sorry for her mother and her siblings in that had finally resulted an injustice in the trial of appellant. This issue was not placed before the assessors in summing up or judgment which declared a mistrial.

Sentence:

Ground 5

THAT the precisely the Sentencing Judge had applied an error of law while selecting his starting point of sentencing at 15 years. The middle end of the tariff and also had already accounted for the aggravating factors built into the tariff in which the Judge again fallen into a trap of double counting that renders the appellants sentence being severally harsh and excessive.

Ground 1

[9] It is generally recognized that the timing of a complaint, whether immediate or delayed, does not inherently determine its truthfulness or falsehood. Each case must be evaluated on its individual merits, taking into account the available evidence, credibility of witnesses, and other relevant factors. The credibility of a complaint is typically assessed based on the totality of the circumstances, including the consistency of statements, corroborating evidence, and other factors that may support or undermine the complainant's account.

[10] A Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in **People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant** G.R. No. 202122[1] quoted the following observations from **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)[2] (G.R. No. 182690 - May 30, 2011) in relation to why a rape victim's deferral in reporting the crime does not equate to falsification of the accusation.

'The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims'

[1] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html

[2] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

[11] The Court of Appeal in **R v D (JA)** [2008] EWCA Crim 2557; [2009] Crim LR 591 held that judges are entitled to direct juries that due to shame and shock, victims of rape might not complain for some time, and that *'a late complaint does not necessarily mean it is a false complaint'*. The court quoted with approval the following suggested comments in cases where the issue of delay in, or absence of, reporting of the alleged assault is raised by a defendant as casting doubt on the credibility of the complainant.

> '*Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you.'*

[12] In as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare to direct the jury or assessors that similarly an immediate complaint does not necessarily demonstrate a true complaint. Thus, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Thus, there is no error in the judge's statement to the assessors that

> *'13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.'*

Ground 2

[13] The prosecution had not relied on the appellant's cautioned interview. Because it was part of the disclosures the trial judge was not required to direct the assessors on the cautioned interview. In fact it would have been a serious error had the trial judge done so.

Ground 3

[14] The trial judge had adequately summarised and directed the assessors on the issue of consent in relation to the third count at paragraphs 58 and 59 of the summing-up and appellant's denials with regard to other two counts. He had addressed his mind more fully to the issue of consent with regard to all counts at paragraphs 12-20 of his judgment.

[15] Concerning the appellant's allegation against his trial counsel, the legal position is that the Court of Appeal laid down an elaborate procedure to be followed when any ground of appeal based on criticism of trial counsel is raised by an appellant in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not complied with the said procedure and therefore, this allegation cannot be considered at this stage.

[16] Nor is there is any material currently on record to substantiate these allegations against the appellant's trial counsel on flagrantly incompetent advocacy based on cross-examination regarding the third count where the appellant had admitted the act of sexual intercourse. In **Ensor v. R** [1989] 89 Cr App R, it was said that an appellate court will only interfere with a conviction on the ground that counsel has not conducted the case properly if it is satisfied that the manner in which it was conducted amounted to flagrant incompetence or in any other way was such that there had been a miscarriage of justice

Ground 4

[17] The appellant's complaint is that the learned trial judge had not placed before the assessors the fact that the complainant had forgiven the appellant and felt sorry for her mother and her siblings.

[18] I think the evidence relating to the appellant's complaint is at paragraphs 47, 51 and 53. However, the trial judge had correctly warned the assessors at paragraph 5 of the summing-up that

> *'5. ……You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offences. You must not form your opinions based on the emotions, sympathies, prejudices, speculations and morality……..'*

[19] Even when the appellant had forgiven the appellant as 'what had happened had happened' and she had also felt sorry for her mother and other siblings, they were not relevant to the crucial matter in issue namely the appellant's culpability.

Ground 5

[20] The appellant's complaint is on double counting. Sentencing tariff for juvenile rape is 11-20 years set in **Aitcheson v State** [2018] FJSC 12; CAV0003 of 2014 (02 November 2018).

[21] Having applied the correct tariff, the trial judge based on objective seriousness of the offending had selected 15 years as the starting point. Then, for aggravating factors the trial judge had made an upward adjustment of the sentence by 04 years. Lowering the 19 years' sentence by 02 years for the migratory factor of the appellant being a first time offender, the trial judge had arrived at the final sentence of 17 years before further deduction was done for the remand period.

[22] The tariff in juvenile rape cases reflect the objective gravity of such offence and many things which make them so serious have been already inbuilt into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided. [per Keith J in **Kumar v State** [2018] FJSC 30; CAV0017 of 2018 (02 November 2018)]. I am not sure whether the starting point of 15 years could be justified in the light of those observations. However, I do not see any error of substantially enhancing the sentence for the subjective aggravating factors set out at paragraphs 12 of the sentencing order. I also do not think that the appellant deserved a discount of 02 years

for being a first time offender as he had been sexually abusing the complainant from 2017 to 2019 on multiple occasions.

[23] In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[24] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

[25] I am not suggesting that the ultimate sentence of 17 years was or was not justified. But, in the above circumstance, I would rather leave it to the full court to decide the matter of sentence mainly because of the starting point of 15 years.

Orders of the Court:

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

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent