IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 120 OF 2018
Lautoka High Court Case No. HAC 41 of 2015

BETWEEN	:	**PETERO MASALA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
		Mataitoga, JA
		Morgan, JA
Counsel	:	**Ms S. Prakash for the Appellant**
		Mr R. Kumar for the Respondent
Date of Hearing	:	**7 July 2023**
Date of Judgment	:	**27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] I am in agreement with Mataitoga, JA that the appeal against conviction and sentence should be dismissed.

Mataitoga, JA

[2] The appellant had been indicted in the High Court of Lautoka on one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009, one count of rape contrary to 207(1) and (2) (a) of the Crimes Act, 2009 and one count of indecent assault contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

[3] The information read as follows:

> ***'COUNT ONE***
> ***Statement of Offence***
>
> ***SEXUAL ASSAULT****: Contrary to section 210 (1) (a)* ***of the Crimes Act No. 44 of 2009.***
>
> ***Particulars of Offence***
>
> ***PETERO MASALA aka PETE MASA MASALA*** *sometime between the 16 day of May 2012 and 19th day of May 2012 at Yalalevu, Ba in the Western Division, unlawfully and indecently touched the vagina of EILEEN BROWN with his finger, without EILEEN BROWN's consent.*
>
> ***COUNT TWO***
>
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to section 207(1)(2)(a) Crimes Decree* No: 44
>
> ***Statement of Offence***
>
> ***PETERO MASALA aka PETE MASALA,*** *sometime between the 16 day of May 2012 and 19 day of August 2021, at Yalalevu, Ba in the Western Division, had carnal knowledge (penile sex) of EILEEN BROWN, without the said EILEEN BROWN's consent*
>
> ***COUNT THREE***
>
> ***Statement of Offence***
>
> ***INDECENT ASSAULT****: Contrary to Section 212(1) of the Crimes Decree No 44*
>
> ***Particulars of Offence***
>
> ***PETERO MASALA aka PETE MASALA*** *sometime between 29 July 2013 and 3 August 2013, at Raiwai, Suva in the Central Division, unlawfully and indecently touch the breast, neck, and private parts of EILEEN BROWN on top of her clothes without consent.*

[4] In the High Court trial the appellant was found guilty by the assessors on counts 1 and 3 [Sexual Assaults] and not guilty on count 2 [Rape]. The trial judge accepted the assessors guilty verdict on counts 1 and 3 but overturned their not guilty verdict on count 2 on Rape. The trial judge found the appellant guilty of all counts for which he was charged and tried in the High Court at Lautoka.

[5] On 2 November 2018 the trial judge passed sentence of 14 years 11 months imprisonment with non-parole period of 12 years.

Summary of the Facts

[6] The brief facts were as follows:

The victim "EB" in 2012 was 15 years of age a Form 3 student. On one of the days during the second term of school she was at the house of her uncle the accused, her aunty had gone to work. The victim did not go to school because she was having stomach ache. The accused offered to massage the victim's stomach, the victim was alone with the accused.

She was wearing a shorts and a top, in the sitting room the accused started to massage the stomach of the victim, as he continued he started to massage the victim's vagina and was playing around by touching it. Thereafter the accused removed the victim's shorts and underwear and went on top of her and penetrated her vagina with his penis. When the accused penetrated her for the second time the victim pushed the accused away because it was painful for her, her legs were shaking she felt weak and emotionally broken.

The victim did not consent to what the accused had done to her. After two days the victim told her friend Faustina about what the accused had done to her. Faustina wanted to tell her mother but the victim stopped her since she felt nobody would believe her and that she was scared.

The matter was reported to the police after the victim couldn't continue to live with it any longer, she informed her distant relative Laisiana Tukana. Between 29 July, 2013 and 3 August, 2013 the victim went to Suva, she stayed at the house of an aunt. The accused also resided there.

One night when she was sleeping she felt a light being shown on her face she opened her eyes and saw the accused shining a torch at her face and at the same time touching the victim's neck, breasts and private part on top of her clothes. The victim was scared and did not know what to do. The accused touched her for about an hour she did not consent to the touching by the accused. The victim later told her relatives and the matter was reported to police. The accused was arrested and charged.

The Appeal

[7] The appeal is against both conviction and sentence. The appellant's timely notice of leave to appeal against conviction and sentence was filed on 29 November 2018. The Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence along with written submissions on 23 September 2020. The State had tendered its written submissions on 05 November 2020.

[8] 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 was reviewed in **Waqasaqa v State** [2019] FJCA 144 (AAU 083/2015) in these terms:

> *"[3] For many years the accepted test for granting leave to appeal against conviction has been stated as being whether there is a ground of appeal that is arguable. The test was considered by the Supreme Court in **Naisua v The State** [2013] FJSC 14*
>
> > *"It is settled that the test for granting leave to appeal against conviction on mixed grounds of law and fact in the Court of Appeal is whether an arguable point is being raised for the Full Court's consideration. We must add that it is not appropriate to reach any conclusion on the merits of the proposed grounds when considering leave. That conclusion should be left to the Full Court."*
>
> *[4] The Supreme Court appears to draw a distinction between considering the appeal in its totality and considering the merits of any of the proposed grounds of appeal. At the leave stage the single judge of the Court should step back and assess whether the appeal is genuinely arguable before the Full Court. Although a particular ground of appeal may raise an arguable point, it does not necessarily follow that the appeal is arguable before the Full Court. Issues raised in grounds of appeal may*

*fall in favour of the appellant as arguable. However, when considered in the context of the appeal as a whole it may become apparent that the appeal is not arguable before the Full Court. The question for this Court is what did the Supreme Court in **Naisua** (supra) mean when it referred to the test as being whether there is an arguable point raised for the Full Court's attention without considering the merits of the proposed grounds*

*[5] The nature of the test has become a matter of some interest more recently because of the significant increase in the number of successful applications for leave to appeal against conviction. In a recent decision of this Court in **Sadrugu v The State** [2019] FJCA 87 (per Prematilaka JA) the test for leave to appeal against conviction was considered in terms of how does the Court distinguish between arguable and non-arguable appeals at the leave stage. In paragraph 13 of that decision the Judge concluded, having reviewed a number of authorities, that:*

*"... the test of reasonable prospect of success as described in **Smith** [2011] ZASCA 15; [2012] 1 SACR 567 (SCA) should be used to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal."*

*[6] For my part and more in keeping with the observations of the Supreme Court in **Naisua** (supra) I would suggest that the test be reworded so that the test is understood to refer to the appeal itself as having a reasonable prospect of success rather than any particular ground of appeal."*

[9] There were two appeal **grounds against conviction** before the Judge Alone in the Court of Appeal. These were:

(i) the learned trial judge erred in law and fact in not providing cogent reasons when overturning the unanimous opinion of the assessors that the appellant is not guilty for the charge of rape.

(ii) that the learned trial judge erred in law and in fact in not adequately assessing the delay in the complaint made.

The grounds submitted for the **appeal against sentence** were:

(i) The learned trial judge erred in principle by double counting having considered aggravating factors that is reflected already in selecting a starting point.

[10] The Judge Alone carefully review the evidence, the summing up and the judgement of the trial and submission urged by the appellant and concluded that both grounds against conviction had no reasonable prospect of success. On the sole ground of appeal against sentence, leave was granted for the appellant to submit his appeal to the full court.

Powers of the Court of Appeal

[11] Section 23(1) of the Court of Appeal Act

> *"(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:*
>
> > ***Provided** that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

[12] In this case for the court to undertake credibility assessment it has only the prosecution evidence sworn by witnesses in court and given after testing by cross-examination to go by and the finding on this issue by the trial judge.

[13] The first ground of appeal was that the trial judge erred in law and fact because he did not provide reasons for overturning the unanimous opinion of not guilty by the assessors. Section 237 [4] Criminal Procedure Decree [CPD] states:

> *'When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
> *(a) written down and*
> *(b) pronounced in open court.'*

[14] In the case of **Setevano v State** [1991] FJCA 3 (AAU 014/1989), the Court of Appeal stated:

> *Clearly the opinions of the assessors in a trial in the High Court are not binding on the trial judge; but if he disagrees with the assessor's opinions, then he is required to give written reasons for differing from them.*

Whilst we would not seek to categorically prescribe the circumstances in which a trial Judge may overrule the unanimous or majority opinions of the assessors a reference to some of the prior judgments of this Court on the subject should be helpful. In Apakuki Saukuru v. R. Cr. App. No. 45 of 1981 this Court referred to decided cases which provide "some guidance to the proper exercise of these particular judicial powers".

We quote the following passages appearing on pages 14, 15 and 16 of this Court's judgment in Apakuki Saukuru's appeal:

'The earliest case appears to have been Ram Lal v. The Queen (Cr. App. 3/1958) in which the following passages appear. We quote them from the judgment in Ram Bali v. R. (1960) 7 F.L.R. 80 at 83:

'In order to justify a Court in differing from the unanimous opinion of the assessors who were in a favourable position to assess the reactions of a man of the class and race they would find the accused to be, there must be very good reasons reflected in the evidence before that Court'...

'A trial judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from an unanimous opinion of the assessors on such a question of fact.'"

With reference to that passage, however, it was said in Ram Bali's case, at p.83:

"It will be observed that, in both of these passages, the Court was careful to limit its propositions to the particular sort of question which arose in that case, namely, the probable reactions to alleged provocation of a man of a particular class and race; and this present Court does not doubt that, on such a question, the Judge ought not to differ from a unanimous opinion of assessors unless he can find - and can find 'reflected in the evidence' - very good reasons for so doing. But it would be wrong to erect this into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations."

The Privy Council in P.C. Appeal No. 18 of 1961 upheld the action of the trial judge in Ram Bali's case and sustained the conviction, saying:

"This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence.

Their Lordships can discern no error in the approach of the learned Judge in arriving at his positive and affirmative conclusions: It is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even 'the slightest shadow of doubt' of the guilt of the appellant."

[15] From the above case laws and cases cited therein, together with the provision of section 237(4) CPD quoted above, the trial judge may not accept the majority opinion of the assessors, provided in his judgement is set out the reasoned grounds, based on the evidence before him. I turn to review the judgement to determine the reasons provided by the trial judge for not accepting the verdict of not guilty by the assessors and evaluate if the evidence at the trial supports them.

Review of Trial Court Judgment & Evidence

(1) Reasons for Over Turning Assessors Not Guilty Verdict

[16] In Fiji, a trial judge has the power to overturn a verdict of not guilty made the assessors. This is because the trial judge by law is the sole judge of fact and law in a trial. Assessors are there to assist the trial judge in evaluating the facts as they assess from evidence of the witnesses at the trial: Section 237 (2) Criminal Procedure Decree 2009. In **Baleilevuka v State** [2019] FJCA 209; AAU 58/2015).

*"[42] The learned Trial Judge in his judgment had correctly cited the cases of **Joseph v The King** [1948] AC 215, **Ram Dulare & others v R** [1955] 5 FLR and **Sakiusa Rokonabete v The State**, Criminal appeal No. AAU 0048/05 and stated, in Fiji the responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with Assessors is that of the trial Judge, who is the sole Judge of facts and that the Assessors duty is to offer opinions which might help the trial Judge and does carry great weight, but he is not bound to follow their opinion. Section 237 of the Criminal Procedure Act states that the Judge in giving judgment "shall not be bound to conform to the opinion of the assessors".*

[17] The relevant evidence for evaluation by this court in carrying out its review, in determining the appeal ground urged by the appellant, is clearly set out in the judgement of the trial judge in paragraphs 8 to 38. It is significant that the trial judge specifically addresses the evidence relating to Counts 1 and 2, which support his judgement.

[18] In terms of the requirements of section 237(4) of the Criminal Procedure Decree, the reasons given by the trial judge in not accepting the majority opinion of the assessors is clearly set out in the evidence given by the state witnesses at the trial outlined at paragraphs 10-16 as regards the count 2 of the rape charge. The response of the appellant to evidence outlined is to make a claim referred to by the trial judge at paragraph 28, this:

> *"The defence on the other hand took up the position that the accused did not sexually assault or have sexual intercourse with the complainant with his penis without consent. The complainant and her family had an animosity against the accused since he married the complainant's aunty after her husband had passed on. In view of this the complainant concocted these false allegations against him since they did not want the accused as part of the family."*

[19] The trial judge evaluated the evidence given by each of the three witnesses, PW1 Eileen Brown - complainant, PW2 Fausitina Totosau and PW3 Laisiana Tukana, called by the prosecution in his written judgment and which was proclaimed in open court. The judgement record of the evidence for the three civilian witnesses are set out in paragraph 10 to 34. In evaluating the creditworthiness of these witnessed the court states:

Paragraph 29 of the judgement, the trial judge stated:

> *"I accept the evidence of **all the prosecutions witnesses as truthful and reliable**. The complainant was able to recall what the accused had done to her and was able to describe the acts of the accused clearly. The incident took place some six years ago, yet the complainant was able to explain what she had done."*

[20] In response to this evidence which were tested in cross examination by counsel for the appellant, the trial Judge at paragraph 35 of the judgement stated:

> *"The defence has been of denial and the position taken by the accused was that he only massaged but did not do anything as alleged. This court rejects the defence denial and suggestion that as a result of animosity between the complainant, her family and the accused, the complainant made a false allegation against him. The undisputed evidence before the court was that the complainant was at the house of the accused on the day of the alleged incident and they had breakfast together. The complainant*

in her evidence also stated that on the day before the alleged incident she had stayed at the house of the accused. This suggest that the relationship between the complainant and the accused was good.

Paragraph 36 The defence has not been able to create any reasonable doubt in the prosecution case."

[21] All of the above evidence and the manner in which the trial judge dealt with them in his judgement, were factors that the Court in **Baleilevuka v State** [2019] FJCA209, identified as relevant considerations. At paragraph 43 of the **Baleilevuka** judgment states:

*"43] The learned Trial Judge had again correctly made reference to the provisions of section 237(4) of the Criminal Procedure Act which states: "When the Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be - (a) written down; and (b) pronounced in open court." He has cited the cases of **Ram Bali v Regina** (1960) 7 FLR 80 at 83, **Ram Bali v The Queen Privy Council** Appeal No 18 of 1961, **Shiu Prasad v Regina** (1972) 18 FLR 70 at 73, and **Setevano v State** [1991] FJCA 3 at 5 and stated the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.*

[22] Having reviewed the evidence adduced at the trial and carefully assessed the reasons provided by the trial judge, which I have referred to above, in overturning the assessors verdict, I am satisfied that the verdict was correct and the trial judge has satisfied the requirement of section 237(4) of the Criminal Procedure Decree and the guideline principles set out in **Baleilevuka** (supra) and the cases referred to in that decision.

[23] The first ground of appeal urged by the appellant has no merit and is dismissed.

(ii) Inadequate Assessment in the Delay in complaint made

[24] The appellant argues that the trial judge had not adequately assessed the delay in reporting the incidents of sexual abuse. In **State v Serelevu** [2018] FJCA 163, the court stated the following:

*'[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."

[25] The trial judge had summarised the issue of delay in paragraph 30 of the judgement as follows:

'[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 Uni160;S160;States, in ***Tuyford;*** *186, 186, N.W. 2d at 548 it was decided that:-*

'The mere lapse of time occurring after 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 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 (non (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 circumstance of the particular case. The remoteness of the scene of e 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.'

[26] In paragraphs 78 to 82 of the trial judge's summing up he stated as follows in addressing the issue of delay in complaint by the complainant:

> *"78. After 2 days the complainant went to Faustina's house to study for her mid-term exam. It was here the complainant told Faustina the reason why she had wanted to go home the other day. Further the complainant told Faustina she did not want to go to the house of her uncle and that she hated her uncle for what he had done to her.*
>
> *79. Faustina Kavoa the best friend of the complainant informed the court the complainant had told the witness that her uncle Petero Masala had offered to massage her sore stomach, when massaging he forcefully penetrated the complainant's vagina with his penis.*
>
> *80. The complainant told the witness two days after the incident. When the complainant told the witness what had happened to her she noticed the complainant was scared and couldn't talk properly.*
>
> *81. Laisiana Tukana knew the complainant since they went to the same church and were also distant relatives. During a Sunday mass at 7.00am she noticed the complainant was crying with her head bowed. After lunch that day the witness received a call that the complainant wanted to see the witness.*
>
> *82. At the hospital the witness after asking the complainant a series of questions came to know that the complainant had been sexually hurt. When questioned whether it was fondling, the complainant replied "yes" the next question whether he had touched her womanhood, the complainant replied "yes". After the complainant calmed down she told the witness the name of the accused."*

[27] In paragraph 30 of the judgement the trial judge stated:

> *"The matter was reported to the police two years after the alleged incident, however, it was due to the fact that from 2012 to 2014 had kept the incident to herself after telling her friend Faustina, but could not continue to live with it any longer. It was too much for particularly when she used to see the accused at family gatherings and he was one of the Eucharistic Ministers in the church. The complainant broke down in church which led her telling the third prosecution witness Laisiana at the hospital what the accused had done to her. Considering the circumstances of the complainant late reporting to police does not affect her credibility, she was scared, confused and did not know what to do. I accept that the complainant triëd to keep the incident to herself and not let anyone know but she could not."*

[28] Having quoted the relevant passages from the trial judge's summing up and the judgement above, to show that the trial judge had adequately considered the explanation for the belated complaint to the police, the appellant had urged the court the delay in

reporting was more an afterthought than and not based on any reasonable and rational basis.

[29] The evidence is that the reporting to the police was 2 years after the incident, but the complainant had shared what were done to her by the appellant to her close friend Faustina 2 days after the incident. In that light the reporting to the police some two years later is not a singular act, rather it is the culmination of the complainant's action in sharing the incident with a close friend [PW2] and a relative [PW3].

[30] Applying the totality of circumstances test that was set out in **Serelevu** [supra], the conclusion of the assessment on this ground is that trial judge has adequately dealt with the 'delay in complaint' ground. There was nothing further that could have been done. This ground of appeal has no merit and is dismissed.

Sentence Appeal – Double Counting of Aggravating Factors

[31] The appellant submits that when the sentence was passed in this case, the aggravating factors may have been double counted in choosing the 12 years as the starting point of the sentence passe by the court. It is important to note that the trial judge is NOT using a sentencing tariff to chose the starting point. He is relying on the power in section 17 of the Sentencing and Penalties Act which states:

> *"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or similar character, the court may impose an* ***aggregate sentence*** *of imprisonment in respect of those offences that does not exceed the total effective imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.'*

[32] As was noted by the trial judge when he announced the sentence that the aggregate sentence regime of section 17 of Sentencing & Penalties Act, the head sentence of imprisonment for one count of sexual assault, one count of rape and one count of indecent assault is 14 years 11 months.

[33] Is this sentence wrong? It is not when you take a step back and look at the totality of offence committed in this case. In my view the sentence is proper.

[34] This ground of appeal against sentence has no merit and is dismissed.

[35] The conclusion is that appeal against conviction and sentence are dismissed.

Morgan, JA

[36] I agree with the reasoning and conclusions in this judgment.

ORDERS:

1. Appeal against conviction and sentence dismissed;
2. Conviction and sentence in the High Court affirmed.

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

COURT OF APPEAL FIJI

Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL

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