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

CRIMINAL APPEAL NO.AAU 03 of 2021
[In the High Court at Lautoka Case No. HAC 93 of 2016]

BETWEEN : **MANUELI VUNIBOLA KOROIBETE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. A. Singh for the Respondent**

Date of Hearing : **30 August 2023**

Date of Ruling : **31 August 2023**

RULING

[1] The appellant, aged 21 had been charged with one count of rape of a female of 16 years old under the Crimes Act, 2009 at Suva High Court. The charge was as follows:

Statement of Offence

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

Particulars of Offence

MANUELI VUNIBOLA KOROIBETE, *on the 5th day of June, 2015 at Nativi Village, Saivou, Ra in the Western Division, penetrated the vagina of* ***'ST'*** *with his penis without the consent of the said* ***'ST'.***

[2] The assessors had unanimously opined that the appellant was guilty. The learned High Court judge also found the appellant guilty of rape and he was convicted accordingly. On 24 May 2019, the appellant was given 15 years of imprisonment (which became 14 years and 11 months and 15 days after pre-trial remand was discounted) with a non-parole period of 13 years.

[3] The appellant's appeal against conviction and sentence is about 01 year and 07 months out of time. The appellant in person had filed an untimely appeal against conviction and sentence. 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).

[4] 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].

[5] The delay is very substantial. The appellant has blamed the trial counsel for the failure to file appeal papers in time. I have no material before me to substantiate his explanation. However, I have seen many an appellant filing appeals in person either without delay or with a minimal delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[6] The High Court judge had summarised the facts in the judgment as follows:

> *5. On 5th June, 2015 the complainant was 16 years of age and a high school student. She was asked by her mother to get a bucket of clothes from the river in the village. At about 7 pm on her way to the river the complainant went past the village hall kitchen at this time she noticed light inside the hall. She entered the hall to see which light was switched on and who was inside the kitchen hall.*

6. *As the complainant entered the hall the accused grabbed the complainant's hand and forcefully made her lie down. He forcefully removed her panty and then forcefully inserted his penis into her vagina and had sex for about 5 minutes. The accused stopped having sexual intercourse when some people came near the hall at this time the accused ran away from the hall. Thereafter the complainant wore her panty and went home. The complainant did not do anything since she was afraid of the accused.*

7. *At school the complainant told her friend about what the accused had done to her thereafter she was taken to the School Chaplain. The complainant said that she did not tell her parents about what the accused had done to her since she was afraid of them.*

8. *At night no one was allowed to go in the village hall kitchen. The complainant stated when the accused was removing her panty she could not do anything such as yell or scream for help because she was afraid of the accused and also she did not want anyone to know that she was inside the hall. The complainant did not consent to have sexual intercourse with the accused.*

9. *Neomai Bale the School Chaplain informed the court on 24th June, 2015 a student came and informed her that the complainant was sick. When the complainant came into the room the witness observed the complainant was sad and crying. The complainant was not looking at her in the eyes and was looking embarrassed. After a while the complainant told the witness that a boy by the name of Manueli from her village had raped her in a vacant house. When the complainant was telling this the witness noticed that the complainant looked relieved but was shivering.*

10. *The witness then took the complainant to the Nalawa Police Station to report the matter.*

11. *On 25th June, 2015 Dr. Krishneel Sharma had examined the complainant at the Rakiraki Hospital. The professional opinion of the doctor was loss of virginity with the loss of hymen membrane*

[7] The appellant had exercised his right to remain silent and not called any witnesses. However, in cross-examination he had taken up the position that he and the complainant had consensual sexual intercourse in the village hall kitchen that evening and the complainant came willingly into the hall where he was. According to the narrative presented in cross-examination, when inside the hall both the complainant and the appellant took off their clothes and had consensual sex and at around 7 pm there were lots of people moving around the village and the complainant did not yell or scream for help or try to run away because she did not want anyone to know that she was in the hall.

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

> *'**Conviction:***
>
> ***Ground 1***
>
> *THAT the learned trial Judge erred in convincing the appellant through which the conviction is unreasonable given the paucity of evidences on the lack of consent.*
>
> ***Ground 2***
>
> *THAT the learned trial Judge had erred in failing to properly assess the delay in the report in light of the surrounding circumstances that affects the veracity of the allegations.*
>
> ***Sentence:***
>
> ***Ground 3***
>
> *THAT the final sentence imposed on the appellant is harsh and excessive in the circumstances of the case.*

01st ground of appeal

[9] The crucial issue in the case was whether there was 'consent' on the part of the complainant as alleged by the appellant in her cross-examination. The appellant's counsel submits that there had been a pre-plan between the complainant and the appellant because she went inside the hall without informing the elders about the light (like a mobile phone light) coming out of the hall knowing that entering the hall at night was prohibited and therefore, it could be inferred that she knew of the presence of the appellant inside the hall waiting for her and she did not yell or scram not because she was afraid of the appellant but did not want others to know that she had got inside the hall. The counsel further submits that there was no evidence that the appellant had threatened her any physical harm.

[10] Most of the arguments are hypothesises based on suggestions made to but denied by the complainant and inferences drawn from her own evidence. It is rather strange that the appellant decided to remain silent (though it was his right to do so) in these circumstances without placing evidence in support of those propositions in as much the assessors and the trial judge had to decide the case primarily on evidence and

reasonable inferences based on such evidence and not suggestions denied by the complainant. The only evidence in the case was that of the prosecution including the complainant who steadfastly alleged forcible sexual intercourse.

[11] Unfortunately for the appellant, I do not find many of the case theories advanced by his appellate counsel even put to the complainant in cross-examination at the trial as per the summing-up and the judgment. There had not been any suggestion that there was an agreement between the complainant and the appellant to meet at the hall in the night on this day. Nor was there any suggestions that the appellant went inside the hall at that time on this day consequent to such pre-arrangement. Neither was there any suggestion that they were in a romantic relationship either. There was no suggestion as to why only the appellant ran away on hearing the voices of some approaching people leaving the complainant.

[12] The opposing narrative suggested by the appellant is equally consistent with innocent explanations such as the complainant going inside the hall to check the light coming out of the hall as no one was expected to be there at that time. Her not screaming and yelling could also be plausible given the unexpected presence of the appellant and her fear of any harm by the appellant coupled with her knowledge that she should not have been seen inside the hall as per the village protocols in that night. Here, the observation of the trial judge that she is a simple, shy and unsophisticated villager goes a long way to explain her behaviour.

[13] Thus, it boils down to the credibility of the complainant and the assessors and the trial judge who had the benefit of seeing the demeanour and deportment of her, had no reasonable doubt at all that her account was truthful. They had not found her deposition to be incredible or inherently improbably as not to be believed. In the absence of any evidence to the contrary coming from the appellant, I do not think that the guilty verdict could be termed as unreasonable or cannot be supported on evidence.

[14] Thus, neither the assessors nor the trial judge had encountered any reasonable doubt in the prosecution case which resulted in the conviction of the appellant. I think it was open to the assessor to find the appellant guilty on the totality of the evidence [see **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24] and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44]. The trial judge too could have reasonably convicted the appellant on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

02nd ground of appeal

[15] The appellant's contention is based on the delay of 19 days in reporting the matter. The failure of complainant to disclose the defilement without loss of time to persons close to them or to report the matter to the authorities does not perforce warrant the conclusion that they were not sexually molested and that their charges against the appellant were 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 (see **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)

[16] 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'* (see **R v D (JA)** [2008] EWCA Crim 2557; [2009] Crim LR 591).

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

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

[17] Thus, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint.

[18] The Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) adopted the 'totality of circumstances' test to assess a complaint of belated reporting as follows.

> '*[24] 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."*

[19] In **Prasad v State** [2020] FJCA 231; AAU02.2018 (20 November 2020) it was held

> *'[21] The credibility of a witness is not diminished simply because his or her complaint is late until and unless he or she is impeached on the footing that either he or she has complained belatedly due to the sinister motive of implicating the accused falsely or the delay enabled fabricating false allegations, embellishments or afterthought as a result of deliberation and consultation. Delayed reporting should be a trial issue for the judge to address the assessors and himself on. It should not be simply taken up as an appeal point for the first time for want of any other legitimate grounds of appeal. If the delayed complaint is made a live issue at the trial it has be assessed by using "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and appropriate directions should be given to assessors. If not, it has to be assumed that the defense has no issue with the complaints not made within a reasonable time and seeks no explanation for the delay.'*

[20] The question of delay has to be considered with the recent complaint evidence of school Chaplain and the trial judge had addressed the assessors on both at paragraph 51.

> *51. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told the School Chaplain on the 24th June, 2015 that the accused had raped her inside a vacant house in the village during the night time and therefore she is more likely to be truthful. On the other hand, defence says the complainant did not immediately tell Neomai or anyone else what the accused had done to her so she should not be believed.*

[21] In the judgment also the trial judge once again gave his mind to 'delay' as follows:

> *6. As the complainant entered the hall the accused grabbed the complainant's hand and forcefully made her lie down. He forcefully removed her panty and then forcefully inserted his penis into her vagina and had sex for about 5 minutes. The accused stopped having sexual intercourse when some people came near the hall at this time the accused ran away from the hall. Thereafter the complainant wore her panty and went home. <u>The complainant did not do anything since she was afraid of the accused.</u>*
>
> *7. At school the complainant told her friend about what the accused had done to her thereafter she was taken to the School Chaplain. <u>The complainant said that she did not tell her parents about what the accused had done to her since she was afraid of them.'</u>*
>
> *14. 'The School Chaplain also told the truth when she narrated what the complainant told her about 19 days after the alleged rape on 24th June, 2015. The delay by the complainant in complaining to anyone about the alleged rape does not affect the credibility and reliability of the complainant's evidence. A 16 year old simple and shy person of the complainant's attribute cannot be expected to immediately inform her peers, friends and families all the details of her forceful sexual encounter by a fellow villager and cousin.*

[22] Thus, the complainant had said in evidence that she did not tell anything soon after the incident for fear of the appellant. The appellant has submitted that he did not threaten the complainant. Fear need not necessarily a result of an express threat. However obnoxious it might appear to an outsider, fear of a rape victim could well be self-induced. Given the complainant's general disposition this is quite possible. Later, she had feared her parents and out of that fear she had not complained to them until she confided to her friend and a student alerted the school Chaplain. It may well be that she feared her parents to tell the ordeal because they would blame her as she suffered this fate due to her having ventured into the hall while on her way to fetch water from the river.

[23] No sinister motive had been suggested to her or demonstrated by the appellant for the complainant to fabricate a serious charge of rape against the appellant, for the incident does not appear to have been discovered by anyone for her to turn consensual sex into an act of rape for self-preservation. Perhaps, she may have suffered emotionally for all those days until she eventually fell sick. She could not have suppressed it anymore and therefore decided to reveal it to her friend to get rid of her mental trauma.

03rd ground of appeal (sentence)

[24] The trial judge applied the sentencing tariff for juvenile rape as 11-20 years (vide **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018). He had set out aggravating factors as follows.

> *a) Breach of Trust*
>
> *The victim and the accused are from the same village and known to each other. The victim was alone, vulnerable and unsuspecting as a fellow villager the victim never expected the accused to do what he did. The accused breached the trust of the victim by his actions.*
>
> *b) Age Difference*
>
> *The victim was 16 years of age and the accused was 21 years at the time of the offending. Although the age difference is not substantial the accused ought to have acted responsibly and restrained himself from what he was doing.*
>
> *c) Victim Impact Statement*
>
> *According to the victim impact statement the victim has been emotionally and psychologically affected in the following manner:*
>
> - *Post traumatic disorder including flashbacks, nightmares, severe anxiety, uncontrollable thoughts;*
> - *Prolonged sadness, feeling of hopelessness, loss of interest in activities, fear, anger;*
> - *Self-blame/guilt in allowing the crime to happen, did not want to go to school.*

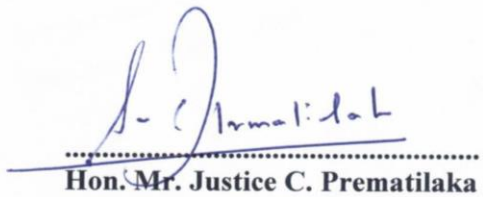
[25] The appellant had not demonstrated any sentencing error but argues that the final sentence is harsh and excessive for a 21 year old appellant which the trial judge had already taken into account. It is true that when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)] and 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)]; if outside the range, whether sufficient reasons have been adduced by the trial judge.

[26] I cannot see at this stage a real prospect of success in the sentence appeal before the full court as it sits below the middle of sentencing tariff and no sentencing error is made out.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.



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