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

CRIMINAL APPEAL NO.AAU 115 of 2020
[In the High Court at Suva Case No. HAC 62 of 2019]

BETWEEN	:	**MALELI KOROIVALU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. I. Romanu for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**25 October 2023**
Date of Ruling	:	**26 October 2023**

RULING

[1] The appellant had been found guilty of one count of rape and one counts of sexual assault and acquitted of one count of sexual assault. The charges were as follows.

'COUNT 1

Statement of Offence

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

Particulars of Offence

MALELI KOROIVALU on the 9th day of February 2019 at Laucala Beach Estate in the Central Division had carnal knowledge of MB without her consent.

COUNT 2

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MALELI KOROIVALU on the 9th day of February 2019 at Laucala Beach Estate in the Central Division unlawfully and indecently assaulted MB by pressing her breasts.

COUNT 3

Statement of offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MALELI KOROIVALU on the 9th day of February 2019 at Laucala Beach Estate in the Central Division unlawfully and indecently assaulted MB by licking her vagina.

[2] The appellant was acquitted of the third count at the close of the prosecution case. At the end of the trial he was convicted of rape and the second count of sexual assault and the trial judge sentenced him on 19 August 2020 to an aggregate sentence of 12 years with a non-parole period of 09 years.

[3] The appellant's solicitors had lodged a timely appeal only against conviction.

[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 and sentence 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 trial judge had summarized the facts in the sentencing order as follows.

> *'3. 'The facts of the case are that the victim was 15 years of age at the time of the offence. She is now 17 years old. She is from a broken family and was brought up by her aunt. After moving from one friend to another, she finally decides to stay with her in a room which her sister had just rented out from your house. When her sister had gone for her night shift, you entered her room. You pushed her to the mattress and forced her to take off her clothes. You pulled down her pants and the undergarment and pressed her naked breast without her consent. You then forcefully inserted your penis into her vagina. You disregarded her complaint that her vagina was painful and you kept on inserting your penis into her vagina. The doctor who medically examined the victim found her hymen not to be intact.'*

[6] The appellant's grounds of appeal are as follows.

> ***'Conviction:***
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> ***Ground 1:***
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> *THAT His Lordship erred in law and in fact in that His Lordship misdirected himself in that women who do not report an attack promptly are lying. The victim in this case had the opportunity to report the incident straight after the alleged incident but didn't.*
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> ***Ground 2:***
>
> *THAT His Lordship erred in law and in fact in that His Lordship failed to deal fairly with the reason given by the victim in not relaying the incident at the first available opportunity, given the fact that the interpreter herself was 'not sure' about the correctness of her translation of the iTaukei word 'weleca'.*
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> ***Ground 3:***
>
> *THAT His Lordship erred in law and in fact in that His Lordship misdirected himself in not giving much weight to the contradictions by the victim, not only version of the allegations of rape, but also on other inconsistencies raised during the trial e.g. was staying with her mother and not her aunt, when did her sister left for work on the day of the alleged incident etc., which raises the credibility of her evidence.*

Ground 4:

THAT the quality of evidence upon which the trial judge convicted the appellant was flawed, inadequate and not sufficient for the trial court to safely convict.

Ground 5:

THAT under all circumstances and in consideration of all the evidence of the case, the finding of the Learned Trial Judge is unsafe, unfair and unsatisfactory.

Ground 6:

THAT the Learned Trial Judge erred in law and in fact when considering the doctor's expert evidence and that the Learned Trial was prejudiced against the appellant during the analysis of the doctor's evidence.

Ground 7:

THAT the prosecution failed in its duty to present a fair case to the High Court by picking and choosing the witnesses to call to the trial at the last minute, and in doing so violated the right to a fair trial of the appellant, which had caused a gross miscarriage of justice.

Ground 8:

THAT the demeanor of the complainant was not consistent during the giving of her statement to police, during her medical examination report and during the trial which casts doubt on her credibility as a complainant.

Ground 01 and 02

[7] I have addressed the often taken up point in appeal based on 'delay' in the recent Ruling in **Leveni Waqa v The State** AAU 77 of 2021 (23 October 2023) and would not repeat the same discussion once again here.

[8] Australian Law Reform Commission[1] states that:

'27.296 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the 'predictors associated with delayed disclosure' reveal differences in reporting patterns depending upon the

[1] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/27-evidence-in-sexual-assault-proceedings-3/evidence-of-recent-and-delayed-complaint/

> *victim's relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, 'it is likely that evidence about a complainant's first complaint would answer the type of questions that jurors can be expected to ask themselves'.*

[9] The pertinent pronouncements on how to evaluate delay are found in **Leveni Waqa v The State** (supra) and **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where the court of appeal adopted the 'totality of circumstances' test to assess a complaint of belated reporting.

> '*[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."*

[10] The trial judge had addressed the assessors on MB's evidence including her evidence for not reporting promptly to another female tenant, Salome and her own sister Alanieta at paragraphs 39-53. The trial judge had independently analysed the issue of delay in the judgment and at paragraph 25 stated that she did tell court that she was scared of the appellant and how he used force on her and how her mouth was shut. She had also told her sister how she was threatened with death. The counsel for the appellant told this court that there is no *iTaukei* word *'weleca'* known to him and obviously, it could not have meant 'forget' or 'forgetfulness'. He also said that the *iTaukei* words for 'forget' or 'forgetfulness' are different. According to The Fijian Dictionary complied by A. Capell PhD for the Government of Fiji (2019) the *iTaukei* words for 'forget' and forgetful' are *guileca-va*; *guiguileca*; *dau guileca ka*. The trial judge had concluded at paragraph 26 that even though there had been a slight delay in reporting, and her conduct may not be consistent with that of a typical adult rape victim, it is the judge's considered view that there were reasonable explanations in the circumstances of this case for her conduct.

[11] The issue of delay also has to be considered in the context of the trial judge's observations at paragraph 6 and 10 of the judgment of MB's character as a backward child which could not have escaped the attention of the assessors too.

> *6. It is not disputed that the complainant was 15 years of age at the time of the alleged incident. She is now 17 years old. My observation of the complainant's appearance is that she is timid, shy and quiet. Her quietness had also been observed by doctor Singh. When she was asked to describe what had happened after the zip of her trousers was lowered, she amply demonstrated her shyness and the difficulty in talking about matters of sexual nature. I had to adjourn the Court several times and she took nearly two days to complete her evidence.*
>
> *10. Despite her apparent uneasiness to talk about sexual matters, the complainant finally opened up and managed to tell her story. She maintained her position that the accused pressed her naked breasts and penetrated her vagina with his penis.*

[12] The Court of Appeal in **R v D (JA)** [2008] EWCA Crim 2557; [2009] Crim LR 591 approved the following direction on 'delay'.

> ''*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.'*

[13] The fact finders have determined that the delay on the part of MB in not promptly reporting the acts of sexual abuse by the appellant was not because she was lying and the trial judge had said that there was no apparent reason why MB should fabricate these allegations against the appellant who was a stranger to her.

[14] It has been stated many times that the trial court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere. There was undoubtedly evidence before the

Court that, when accepted, supported such verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)]

Ground 03, 04, 05 and 08

[15] In the first place, the basis of challenge to a verdict of guilty in Fiji is not whether it is unsafe, unfair or unsatisfactory (or untenable) (see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) & **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. It is, in terms of section 23(1) of the Court of Appeal Act, whether the (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the Appellant if the Court considers that no substantial miscarriage of justice has occurred.

[16] The test to determine a *'verdict which is unreasonable or which cannot be supported by evidence'* as laid down by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) namely whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, could be adopted *mutatis mutandis* to a verdict delivered by a judge alone because in any event in Fiji the assessors were not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors were 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. Thus, whether the trial judge also could have reasonably convicted the appellant on the evidence before him is also equally applicable as a test when a verdict delivered by a judge is challenged on the basis that it is unreasonable (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[17] At paragraphs 39-53 of the summing-up while summarising MB's evidence, the trial judge had highlighted all the discrepancies, be they inconsistences, contradictions, omissions etc., in her evidence to the assessors. Then under 'Analysis', the trial judge

had drawn the attention of the assessors to some of the salient inconsistencies and the demeanour of MB.

[18] Then, the trial judge had independently analysed and evaluated MB's evidence itself and her evidence vis-à-vis her sister's evidence in terms of inconsistencies at paragraphs 19 - 24 and felt that they were on peripheral matters, insignificant and not having reached the threshold of material contradictions sufficient enough to discredit MB's version and not on crucial points in relation to the sexual acts. In other words the trial judge had concluded that the inconsistencies in MB's evidence was not capable of shaking the very foundation of prosecution case [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. Therefore, I think that on the totality of evidence it was quite open to the trial judge to have been satisfied with the appellant's guilt beyond reasonable doubt.

Ground 06

[19] The trial judge had narrated the medical evidence at paragraph 54-57 of the summing-up which has shown that that the history and the physical examination findings were suggestive of a sexual intercourse. MB had had sexual intercourse or had sexual penetration as her hymen was not intact.

[20] In his judgment, the trial judge had once again given his mind to medical evidence at paragraph 27 and concluded that the doctor's findings on 12 February 2019 was consistent with MB's evidence that she was raped on 9 February 2019.

[21] I do not see an error of reasoning in the manner in which the trial judge had addressed the assessors or his own judgment with regard to medical evidence, not least any bias on his part. Medical evidence had not in any way discredited MB's evidence.

[22] The fact remains that even without medical evidence, the case could be proved on MB's evidence alone if believed by fact finders which they eventually did.

Ground 07

[23] The complaint is about the prosecution not calling MB's sister Alanieta and the defence having to call her as their witness. Whatever the reason for the prosecution not calling Alanieta which was part of the prosecutorial discretion, the defence called her in order to contradict MB. The trial judge had addressed the assessors on Alanieta's evidence at paragraph 84. In the judgment too, at paragraph 20 the trial judge had dealt with Alanieta's evidence. The defence had managed to demonstrate some inconsistencies in MB's testimony by calling her sister. However, at the same time Alanieta had corroborated some parts of MB's evidence. Both parties have to live with the ultimate result with regard to Alanieta as a witness. Both parties knew in advance what she would come out with in her testimony which persuaded the prosecution not to call her and prompted the defence to call her. They were strategic decisions taken by both parties in the conduct of their respective cases.

[24] The prosecution's decision not to call Alanieta had not caused a miscarriage of justice to the defence or resulted in an unfair trial.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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