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

CRIMINAL APPEAL NO. AAU 123 of 2022
[In the High Court at Labasa Case No. HAC 57 of 2020]

BETWEEN	**:**	**RAM KRISHNA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. J. Reddy for the Appellant**
	:	**Ms. L. Latu and Ms. M. Lomaloma for the Respondent**
Date of Hearing	**:**	**10 April 2024**
Date of Ruling	**:**	**12 April 2024**

RULING

[1] The appellant had been changed at Labasa High Court with the following count:

[COUNT 1]
Representative Count
Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.*

Particulars of Offence

RAM KRISHNA*, between the 1st of March 2020 and the 20th of March 2020, at Labasa in the Northern Division, unlawfully and indecently assaulted* ***S.C.B*** *by bringing into contact his tongue and her vulva.*

[COUNT 2]
Representative Count
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

> ***RAM KRISHNA****, between the 1st of March 2020 and the 20th of March 2020, at Labasa in the Northern Division, had carnal knowledge of* ***S.C.B****, a child below the age of 13 years.*

[2] The High Court judge convicted the appellant and sentenced him on 08 November 2022 to a final sentence of twelve (12) years, eleven (11) months and eighteen (18) days imprisonment with a non-parole period of seven (07) years, eleven (11) months and eighteen (18) days.

[3] The appellant's appeal against conviction is timely.

[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 prosecution evidence had been summarised by the trial judge in the sentencing order as follows:

> 2. *The complainant S.C.B, born on 16th November 2009, was 10 years in March, 2020. You were almost 65 years old and was the immediate neighbor. You were known to her grandfather and has known her father and S.C.B since her birth. She considered you almost as a grandfather. Though there was some estrangement between your families the girl did respect you as an elderly neighbor. She spends much of her time when at home with her grandmother and the younger brother. Her mother and father are usually out during the day in view of their work and her elder brother live elsewhere.*

3. *During the week in question she remained at home and you did call her to a mango tree behind your houses. Then you forcibly inserted your penis and also licked the top part of her vulva. Once again, may be a day or two after, you accost her near the same mango tree and did the same thing. This is followed by three other acts of similar nature where you have successfully induced and got the girl to come to the mango tree to satisfy your lust. You by threats or otherwise kept the girl silent and ensured that she did not tell anybody. You have clearly taken advantage of a girl of 10 years in this way surreptitiously until your wife found out and this became public.*

4. *On all five occasions you did penetrate her vagina, lick her vulva and also suck her breast. This clearly shows that despite your seniority in age you have taken advantage of an extremely vulnerable girl who was young enough to be your granddaughter. These are the sordid acts I am reluctantly compelled to reproduce to lay the bare facts of this offending which is necessary.*

[6] The appellant had preferred 13 grounds of appeal against conviction and his counsel urged all except 09th and 10th grounds at the hearing:

Conviction:

Ground 1:

THAT the Learned Trial Judge erred in law and in facts when convicting the Appellant on one representative count of Sexual Assault and one representative count of Rape when the totality of evidence does not support the charges that the Appellant is guilty beyond a reasonable doubt.

Ground 2:

THAT the Learned Trial Judge erred in law and in facts in its finding that the complainant and her mother's evidence is probable, credible and truthful when there were material inconsistencies and omission in their evidence which created doubts.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the location where the incident took place and the fact that is not possible to for anyone to escape injuries if pushed to the ground as described by the complainant.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider in his judgment that the complainant's mother had beaten the complainant 108 times before the complainant agreed to the rumors.

Ground 5:

THAT the Learned Trial Judge erred in fact when it undermined the capability of the complainant in giving account of a false and a fabricated story.

Ground 6:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider in his judgment that the complainant and the supporting witnesses were enemies for the accused person and the complainant were not in talking terms with the accused and his family.

Ground 7:

THAT the Learned Trial Judge erred in law and in fact in its finding that the contradictions and inconsistencies in the complainant's evidence was due to faulty memory when no evidence was elicited by the complainant that she does not remember the events.

Ground 8:

THAT the Learned Trial Judge erred in law when it gave no weight to the fact the complainant throughout the Trial had concealed the fact that she was having menses and that was the reason why she was not going to a the when it undermined the capability of the complainant in giving account of a false and a fabricated story.

Ground 9:

THAT the Learned Trial Judge erred in fact in its finding that a fabricated story would be a straight forward incident and not series of acts.

Ground 11:

THAT the Learned Trial Judge erred in law and in fact in accepting hearsay evidence from the prosecution witnesses.

Ground 12:

THAT the Learned Trial Judge erred in law and in fact in accepting the justifications for the delay in complainant.

Ground 13:

THAT the Learned Trial Judge erred in law and in fact in its finding that the defence of fabrication and false allegation is extremely improbable when there was proof before the court indicating ulterior motive.

Ground 1

[7] The appellant canvasses his conviction on the basis that it was either unreasonable or could not be supported by evidence.

[8] For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ……**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. **These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors**'*

[9] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[10] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[11] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[12] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carry out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[13] Having considered the comprehensive judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. On the totality of evidence before him, it was open to the trial judge to have reasonably convicted the appellant.

Grounds 2 and 7

[14] The trial judge has carefully considered the inconsistencies highlighted by the appellant namely (i) whether the victim wore a panty during incidents and (ii) sequence of the events; *i.e.* whether penetration preceded licking and whether the

victim's mother and grandmother were at home when the victim was sworn at by the appellants' wife Ima, at paragraphs 39-42. The judge has held them to be incapable of making the victim' evidence untruthful.

[15] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) it was held:

> *[13] .....the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
>
> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

[16] When considering the weight to be attached to the alleged inconsistencies one must also not forget the fact that the victim was just 10 years old at the time of the incidents. I have no reason to disagree with the trial judge's finding on her credibility despite the inconsistencies as he had the great advantage of seeing and observing the victim in the witness box facing a lengthy cross-examination but still managing to remain steadfast.

Ground 3

[17] Although the appellant argues that the victim should have suffered injuries on her back as she fell on a rocky and hard ground, the trial judge had stated otherwise at paragraph 26 of his judgment. At this stage I find no material to contradict the trial judge on his basic factual finding.

> *'26. It was suggested that if she was pushed back she ought to have sustained injuries to her back. The witness explained that as she fell backwards she*

kept her hands on the ground and prevent falling down and that this place was soft and muddy.'

Ground 4

[18] I do not find any reference in the judgment to the victim's mother Sanju having hit her 108 times (who counted the exact number of hits is not clear) before she came out with the allegations of sexual abuse and rape. However, it appears that the victim had not divulged the incidents to her mother due to fear of getting assaulted (and also the threats issued by the appellant not to divulge his acts to anyone) for a long time until rumours started circulating and reaching Sanju as well. Before that Ima appears to have got to know what went between the appellant and the victim and even told it to various people in the village to discredit the victim and her family. They were at loggerheads with each other at that time. Ima even came up to the victim's house and abused the victim It was only when the rumours reached the mother's ears that she confronted her daughter who reluctantly revealed what happened between her and the appellant and what the appellant had done to her. The mother had been very angry and she had indeed hit the victim. This scenario does not necessarily make the victim's evidence unreliable. This complaint goes to the appellant's more substantive argument based on delayed reporting and it can also be conveniently considered in that context.

Ground 5, 6 and 13

[19] The appellant argues that there was a strong and sinister motive on the part of the victim to have fabricated a false narrative of sexual abuse due to the animosity between the two families.

[20] The trial judge had dealt with this aspect of the case at paragraphs 52-54 of the judgment and held for the reasons given that to his mind, making a false allegation of this nature in the circumstances of the case was highly improbable.

[21] The appellant has not demonstrated as stated by Keith J in ***Lesi*** that the trial judge could not have reasonably taken this view and why this court should necessarily take a different view.

Ground 8

[22] The appellant argues that the trial judge had not adequately considered the fact that the victim was having menses during these incidents suggesting that because of that he could not have committed the alleged acts of sexual abuse on her.

[23] However, I find that the trial judge had indeed given his mind to this proposition at paragraph 45 of the judgment and held that it was not improbable that the appellant had indulged in the alleged acts while the victim was still in menses. As I said regarding the previous ground of appeal, the appellant has not shown why the trial judge could not have reasonable taken this view on an analysis of the evidence and why this court must necessarily take a different view.

Ground 11

[24] The appellant has not made any submissions to substantiate this ground of appeal.

Ground 12

[25] This perhaps is the most potent of the grounds of appeal. It is based on delayed reporting of the incident by the victim. The delay is about 07 months.

[26] 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 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."*

[27] The above test was adopted in Fiji in **State v Serelevu** [2018] FJCA 163. See **Prasad v State** [2020] FJCA 231; AAU02.2018 (20 November 2020) also. 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. 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 but the surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case.

[28] **The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law by Eoin Jackson**[1] says:

> *As noted by the academic Wigmore, the origin of the doctrine of recent complaint lies in the medieval expectation that a victim of rape would raise a 'hue and cry' in order to make the community aware that a violation had occurred. Stanchi, writing in the Boston College Law Review, discusses how this can be linked to the historical mistrust of female witnesses, with the promptness of the complaint being equated to an alleviation of some of this mistrust……. For example, Heffernan has noted how the doctrine continues to operate on the assumption that a victim will report an incident of sexual assault as soon as is reasonably possible. This ignores a myriad of factors a victim may be feeling, such as fear, humiliation, and intimidation…… A personal connection to the abuser will naturally hinder victims from promptly reporting the incident, given they may need to weigh up the effect reporting the assault has not just on them, but on the relationships within their broader social and familial circle……..The outdated perception that a victim will immediately report a traumatic incident does not take into account the various psychological and personal factors at play and other complexities, in particular those that arise where the victim is familiar with their abuser….. While it is logical for a victim to consult with someone they perceive to be knowledgeable about the matter at hand, yet the doctrine of recent complaint ignores this in favour of a blanket presumption that an immediate disclosure will be made…… The recent complaint doctrine strictly focuses on the idea of reporting as soon as reasonably possible in the context of the mind-set of the victim, as opposed to enquiring as to whether there are any excuses that would justify an otherwise 'unreasonable delay'.*

[1] https://eaglegazette.wordpress.com/2021/09/13/the-doctrine-of-recent-complaint-anti-feminist-narratives-in-evidence-law/

[29] According to Jackson in recent times, the doctrine has been modified to allow for a 'reasonable excuse' justification. This justification would allow for the prosecution to argue that the victim had a reasonable excuse for delaying in making a complaint. In assessing this excuse, the judge could take into account the emotional state of the woman namely that she was not in a psychological state to make a complaint at the first available opportunity, the nature of the relationship between the accused and victim, and the factual context of the charge itself. It would also account for cases where the victim consults with someone they know prior to making a complaint. This justification would allow for a more inclusive version of the doctrine of recent complaint to be embedded into jurisprudence. It would allow for a version of the doctrine grounded in an emphasis and understanding of the complexities that can arise in the aftermath of a sexual assault. It does not remove the time element, but merely adds nuance sufficient to prevent it from being the determining factor when considering the veracity of testimony.

[30] Australian Law Reform Commission[2] 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 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'.*

[31] For example, 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[3] quoted the following observations from **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)[4] (G.R. No. 182690 - May 30, 2011)

[2] 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/
[3] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html
[4] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

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'*

[32] 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.'*

[33] Thus, as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare for the judges to direct themselves 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.

[34] The trial judge had devoted a great of space in the judgment to discuss the issue of delay (see paragraphs 46-51). Further, the victim's evidence was that she in fact complained to the appellant's wife promptly but not only Ima ignore it but also failed

to communicate the complaint to her mother Sanju Lata. There is nothing to indicate in the judgment that this evidence had been challenged by the defence though neither party called the appellant's wife as a witness.

Order of the Court:

1. Leave to appeal against conviction is refused.

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

Solicitors:

Jiten Reddy Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent