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

CRIMINAL APPEAL NO.AAU 02 of 2018
[In the High Court at Suva Case No. HAC 164 of 2016S]

BETWEEN	:	**UMESH PRASAD**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Ms. S. Nasedra for the Appellant**	
	:	**Ms. K. Semisi for the Respondent**	
Date of Hearing	:	**19 November 2020**	
Date of Ruling	:	**20 November 2020**	

RULING

[1] The appellant, a school teacher, had been indicted in the High Court of Suva on three counts of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009, one count of rape contrary to section 207(1) and (2) (c) and (3) of the Crimes Act, 2009, six counts of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 and three counts of sexual assault contrary to section 210 (1)(b)(ii) of the Crimes Act, 2009 committed at Kinoya, Nasinu in the Central Division. Thus, the appellant faced 13 counts of sexual abuse charges in relation to 09 female victims; all of whom were his students under 13 years of age.

[2] The information read as follows.

"***FIRST COUNT***

Representative Count

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 1st day of January 2010 to the 18th day of November 2012 at Nasinu in the Central Division penetrated the mouth of a girl namely* ***V.T*** *a child under the age of 13 years, with his penis.*

SECOND COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 1st day of January 2010 to the 18 day of November, 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***V.T*** *by touching her breasts.*

THIRD COUNT

Representative Count

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1)(b)(ii) of the Crime Act 2009*

Particulars of Offence

UMESH PRASAD *between the 1st day of January 2010 to the 18th d ay of November 2012 at Nasinu in the Central Division procured* ***V.T.*** *to witness an act of indecency by displaying his penis to her.*

FOURTH COUNT

Representative Count

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(a) of the Crime Act 2009*

Particulars of Offence

UMESH PRASAD *between the 24th day of January 2011 to the 2nd day of December 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***K.R.*** *by touching her vagina.*

FIFTH COUNT

Representative Count

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(b)(ii) of the Crime Act 2009.*

Particulars of Offence

UMESH PRASAD *between the 23rd day of January 2011 to the 31st day of December 2012 at Nasinu in the Central Division procured* ***L.S.*** *to witness an act of gross indecency by displaying his penis to her.*

SIXTH COUNT

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 23rd day of January 2011 to the 17th day of August 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***S.N.*** *by touching her vagina.*

SEVENTH COUNT

Representative Count

Statement of Offence

RAPE: *Contrary to Section 207(1) and (2)(b) and (3) of the Crime Act 2009.*

Particulars of Offence

UMESH PRASAD *between the 23rd day of January 2012 to the 12th day of November 2012 at Nasinu in the Central Division penetrated the vagina of a girl namely* ***S.C.*** *a child under the age of 13 years, with his finger.*

EIGHTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 23rd day of January, 2012 to the 12th day of November 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***S.C.*** *by touching her thighs.*

NINTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 1st day of January 2011 to the 31st day of December 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***R.*** *by touching her breasts.*

TENTH COUNT

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(b)(ii) of the Crime Act 2009*

Particulars of Offence

UMESH PRASAD *between the 1st day of January 2011 to the 31st day of December 2012 at Nasinu in the Central Division procured* ***R.R.*** *to witness an act of gross indecency by displaying his penis to her.*

ELEVENTH COUNT

Representative count

Statement of Offence

RAPE: *Contrary to Section 207(1) and (2)(b) and (3) of the Crime Act 2009.*

Particulars of Offence

UMESH PRASAD *between the 23rd day of January 2011 to the 14th day of November 2011 at Nasinu in the Central Division penetrated the vagina of a girl namely* ***A.R.*** *a child under the age of 13 years, with his finger.*

TWELVETH COUNT

Statement of Offence

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

Particulars of Offence

UMESH PRASAD *between the 3rd day of September2012 to the 30th day of November 2012 at Nasinu in the Central Division unlawfully and indecently assaulted* ***A.M.G.*** *by poking the buttocks of the said* ***A.M.G.*** *with a stick.*

THIRTEENTH COUNT

Representative Count

Statement of Offence

RAPE: *Contrary to Section 207(1) and (2)(b) and (3) of the Crime Act 2009.*

Particulars of Offence

UMESH PRASAD *between the 1st day of October 2012 to the 31st day of October 2012 at Nasinu in the Central Division penetrated the vagina of a girl namely* ***A.T.R.*** *a child under the age of 13 years, with his finger.*

[3] At the conclusion of the summing-up on 06 December 2017 the assessors' opinion had been unanimous that the appellant was guilty of all counts against him. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant and on 07 December 2017 sentenced him to 14 years of imprisonment on each count of rape and 03 years of imprisonment on counts of sexual assault; all sentences to run concurrently with a non-parole period of 13 years.

[4] The appellant's lawyers had filed a timely notice of appeal against conviction and sentence on 09 January 2018. He had filed an abandonment notice on 31 August 2020 in Form 3 on his sentence appeal. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction and written submissions on 04 September 2020. The state had tendered its written submissions on 05 October 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal urged on behalf of the appellant against conviction are as follows.

Ground One:

That the learned trial judge erred in law and in fact in not directing the assessors a fair and balanced summing-up as between the prosecution and the defense case hence there was a substantial miscarriage of justice.

Ground Two:

That the learned trial judge erred in law and in fact when he failed to warn or direct the assessors and himself on the issue of recent complaint and/or delayed reporting hence causing a substantial miscarriage of justice.

[7] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows.

> *2. The brief facts of the case were as follows. You had been a primary school teacher since 2004. You were 22 years old at the time. You began teaching in the Western Division, in the Ba area. From 2010 to 2012, the time of the offences, you were teaching at the Assembly of God Primary School in Kinoya, Nasinu. You taught the students Maths, English, Health Science, Social Science, Elementary Science, Physical Education, Art and Craft and Music. According to your colleagues, you were a hard worker, well dressed and were always on time and present at school. To some of your colleagues, you were a model teacher.*
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> *3. However, unbeknown to your colleagues, you were secretly abusing your female students in your classroom. Your targets were students under the age of 13 years. Your offending occurred between 1 January 2010 and 31 December 2012. You started with PW1. You began touching her breasts over her uniform. You forced her to touch your penis. You masturbated and ejaculated in front of her. Then you forcefully penetrated her mouth with your penis. Next you moved onto PW2, PW3 and PW4. You touched PW2's vagina over her uniform. You masturbated in front of PW3. You touched PW4 on the vagina over her uniform with your elbow. Then you target PW7. You touched her thigh and vagina. Then you pulled up her uniform, inserted two fingers into her vagina, and played with the same.*
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> *4. Your abuse continued. You next targeted PW8 and PW5. You fondled PW8's breasts. Later you masturbated and ejaculated in front of her. You poked PW5's buttocks in the classroom with a stick. Then you targeted PW9 and PW6. You called PW9 to the back of the classroom. You pulled her uniform up, removed her undergarments, inserted 2 fingers into her vagina, and played with the same. You did the same to PW6.'*

[8] In addition, three teachers and a doctor had been called by the prosecution. Dr.Elvira Ongbit had examined three victims and found partial healed hymeneal lacerations and

opined that their vaginas had been penetrated previously by a penis, finger or other objects.

[9] The appellant had chosen to give sworn evidence but called no witnesses. He had denied all the allegations against him on oath and said under cross-examination that the girls had made allegations of sexual abuse against him under the influence or at the instigation of Master Amrit Prasad. However, the state points out in its submissions that the defense counsel did not suggest to Amrit Singh in cross-examination that he had influenced the victims to complain against him due to professional disagreements with the appellant nor was it suggested to the victims under cross-examination that they had lodged complaints against the appellant at the instigation of Amrit Singh. Needless to say, that this failure seriously diminish the credibility of the alleged motive for the appellant having been implicated in the crimes as suggested by him.

01st ground of appeal

[10] The gist of the appellant's complain is that the trial judge had not delivered a balanced summing-up in that he had over stressed the prosecution case while not adequately impressed the assessors on the appellant's case. He cites the number of paragraphs devoted to the prosecution case and the defense case in the summing-up and some expressions such as *'the defense case was very simple'* (see paragraph 28) and *'obviously, his evidence is still fresh in your minds, and I do not wish to bore you with the details'* (see paragraph 42) as examples of the alleged lop-sided summing-up.

[11] On a perusal of the summing-up, it appears that there have been 09 victims, three teachers and one doctor who had given evidence against the appellant whereas only the appellant had given evidence for his defense. The trial judge had addressed the assessors on the prosecution case from paragraphs 21-26 and 34-41 and the defense case from paragraphs 27-29 and 42 of the summing-up. Given the number of charges in the information and the number of witnesses who had given evidence for the prosecution, the devotion of a numerically greater number of paragraphs to the prosecution case was not only necessary but also inevitable. In fact it is clear that even with the prosecution case the trial judge had been as concise as possible not to burden

the assessors with too much peripheral details of each and every witnesses. Yet, he had placed the essential evidence in a summarized form before the assessors for them to decide the crucial issues involved in the case without getting distracted by minute details. The summing-up makes it clear that a copy of the information and the agreed facts were before the assessors as well (see paragraph 7 and 31).

[12] Even the expressions such as *'the defense case was very simple'* (see paragraph 28) and *'obviously, his evidence is still fresh in your minds, and I do not wish to bore you with the details'* (see paragraph 42) should be looked at in that context. The trial judge had used the expression *'I'm sure the details of their evidence are still fresh in your mind, and I will not bore you with the details..'* even in regard to the prosecution case (see paragraph 34). Leading of evidence at the trial had seemingly taken only 05 days spanning over a week to conclude. Therefore, it is not unreasonable to assume that the evidence led in the case for both parties was still fresh in the minds of the assessors when the summing-up was delivered. A copious narration of all the evidence once again in the summing-up was not only unnecessary but also would have been an unwelcome diversion of the fundamental issues away from the assessors.

[13] Therefore, I do not think that there is anything materially objectionable in the form and content of the summing-up. Every summing-up has to be tailor-made to the need of the case at hand. The appellant has not demonstrated that it is obnoxious to the observations made in **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) where having examined a number of previous judicial pronouncements, the following were identified as possible defects in a summing-up leading to a miscarriage of justice.

> (i) The summing up not tailored to the facts and circumstances of the case.
> (ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.
> (iii) Little weight given to the strong points for the defence and a fair picture of the defence not given to assessors *i.e.* not putting the defense fairly to the assessors.
> (iv) The contentious issues put in a way favourable to the prosecution and unfavourable to the Appellant.

(v) The Judge at times appears to have usurped the fact finding function of the assessors.

(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.

[14] The state has, not without merits, stated that the appellant's counsel should have sought redirections in respect of those alleged inadequate directions, misdirection or non-directions as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[15] Accordingly, there is no reasonable prospect of success in appeal on the first ground of appeal.

02nd ground of appeal

[16] The appellant argues that there was possible recent complaint evidence raised by the prosecution *via* the evidence of PW3 and PW4 as borne out by paragraph 23 of the summing-up and the learned trial judge had failed to direct the assessors on the recent complaint evidence. The state has stated that only three out of nine victims had informed witness Amrit Singh of what the appellant had done to them and he had in turn informed the other two teachers who gave evidence at the trial. Thereafter, there had been a class interview where the rest of the victims had come forward to disclose their experiences and then the matter had been reported to the police.

[17] The state has also responded by stating that the prosecution did not offer any evidence of recent complaint at the trial and the evidence of PW4 that he reported the mater to Master Amrit and that of PW3 who had reported what she experienced to other teachers was merely part of the narrative as to how the complaints of sexual abuses got reported to the police. The state also admits that the complaints were in any event not recent. In the circumstances, it is obvious that the directions on recent complaint as articulated in **Raj v State** [2014] FJSC 12; CAV0003 of 2014 was not required to be given by the trial judge. Specific directions on recent complaint evidence are required only if the prosecution seeks to admit such evidence and if it is allowed to be so led by the trial judge.

[18] On the other hand, if this was a concern to the appellant at the trial his lawyers should have raised it with the judge and sought a redirection (see **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19: AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17: CAV 0009 of 2018 (30 August 2018). It is clear that neither the prosecution: nor the defense: nor the trial judge had proceeded on the basis that there was recent complaint evidence. Therefore, the appellant appears to have raised this issue at this stage only as a convenient appeal point and therefore, it has no merits or reasonable prospect of success in appeal.

[19] In the same vein, the appellant argues that the trial judge had failed to address the assessors on delayed reporting. Obviously, if the complaints had been recent they could not have been belated at the same time. These two arguments are self-contradictory.

[20] The respondent has submitted that the appellant did not raise the issue of delayed reporting at the trial. It was the paramount duty on the part of the trial lawyers to challenge the evidence of the prosecution on the ground of belated complaints at the appropriate stage of the trial itself so as to enable the witnesses to explain, if possible, why their complaints were delayed.

[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.

[22] I dealt with a similar complaint by an appellant in **Bulago v State** [2020] FJCA 94; AAU084.2016 (2 July 2020) as follows.

> *'[25] However, the delay in reporting the acts of sexual abuses does not feature in the summing-up or the judgment. It appears that the appellant had not challenged the credibility of the complainant on the basis of delay thus preventing the learned trial judge from addressing the assessors in the summing-up and himself in the judgment on that issue. The appellant was defended by counsel at the trial. Lack of any motive attributed to the complainant to have falsely implicated the appellant in a series of acts of sexual abuses over a long period of time is also intriguing. Had the defense counsel raised the question of delay even at the very last stage of closing addresses that would have prompted the trail judge to have directed the assessors on the issue of delay in the summing-up. The fact that the complainant had not been confronted with the question as to why she had not reported these acts of sexual abuses going on since 2010 until 2014 may have prevented her from presenting an explanation for the assessors and the trial judge to consider whether it was satisfactory and credible.*
>
> *[26] Therefore, it appears that the complainant had not been afforded an opportunity, either deliberately or otherwise, from explaining whether she made the complaint at the first available opportunity within a reasonable time (according to the appellant's written submissions the last sexual act was said to have occurred in October 2014 and the complaint was also made in October 2014) or if not whether there was a reasonable explanation for the delay since February 2010.*
>
> *[28] The appellant has not refereed to me any authority to buttress his argument that in a situation such as this the trial judge has a duty or is obliged as a matter of law to raise the issue of delay in reporting with the assessors and take it up himself on his own in the judgment. Perhaps, if the appellant decides to renew his appeal before the full court he may attempt to convince the court of any merits of his argument with legal authorities.'*

[23] I also dealt with the matter of delay in complaints of sexual abuse cases morefully in **Vulaono v State** [2020] FJCA 209; AAU0004.2018 (28 October 2020) where I further said

> *'[32] As far as the appellant's case is concerned there is nothing to indicate in the summing-up that he represented by counsel had challenged the victim's credibility on the basis of delayed reporting of the incidents relating to first to third counts. If the appellant had wished to discredit the victim on the basis of fabrication of allegations as a subsequent reflection as evidenced from the late complaint the victim must have been confronted with that line of defense in cross-examination. Only then could the victim have explained reasons for not making a prompt complaint regarding the incidents in 2006, 2007 and 2008.*

Otherwise, the appellant's argument based on 'delay' in reporting remains only an afterthought taken up simply as an appeal point.'

[24] I think that the decision in **Longman v The Queen** [1989] 168 Clr 79 cited by the appellant is not applicable here as the High Court of Australia was in that case interpreting section 36BE of the Evidence Act, 1906 (W.A.) *vis-à-vis* the traditional warning that it is unsafe to convict on the uncorroborated evidence of the victim or a child of a sexual assault offence. The legal frame work in Fiji is different. Circumstances under which the unlawful and indecent assault had happened in ***Longman*** are significantly different to the appellant's case and in ***Longman*** no complaint had been made for over 20 years and her explanation for the silence for so long was not convincing which shows that she had been asked to explain.

[25] Therefore, there is no merit or real prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL