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

CRIMINAL APPEAL NO.AAU 04 of 2021
[In the High Court at Suva Case No. HAC 123 of 2019]

BETWEEN	:	**RAVINESH CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Yunus for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**30 November 2022**
Date of Ruling	:	**02 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva and found guilty of one count of sexual assault and three counts of rape after trial. The offences formed part of one transaction that occurred on 21 March 2019 at Luvuluvu Road, Nausori. The victim was 15 years of age at the time of the incident and the appellant was a pastor.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with their opinion and convicted the appellant as charged. The appellant had been sentenced on 16 September 2020 to an aggregate term of 14 years' imprisonment for one count of sexual assault and three counts of rape with non-parole period of 11 years.

[3] The appellants' appeal through Messrs. M Y Law 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 had called 06 witnesses including the victim, her mother and the doctor. The victim's evidence had been summarised by the trial judge in the summing-up as follows:

> *"[38] In relating to the alleged incidents the complainant told the court that in the afternoon of 21 March 2019 the Accused picked her up from her home to buy a cake for her birthday celebration. She said that the Accused spoke to her mother on the phone regarding the arrangements for the celebration. Her mother allowed her to accompany the Accused to buy cake because he was their pastor and they had known him for about a year. She said that the Accused drove a taxi. She sat on the front passenger seat. He drove past the airport and parked his vehicle at an isolated spot. He told her that he was in love with her. She said she was shocked. She didn't say anything. He pulled her towards him and kissed her on her lips for a few seconds. He took her hand and placed on his penis for her to hold it. He opened the zip of her dress and pulled down the left sleeve. He sucked her breast. After that he had a call which he answered. The complainant said that she was in a state of shock. The Accused was known as a trusted person.*
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> *[39] The complainant said that after the phone call the Accused held his penis and forced her mouth on his penis. She said that he penetrated her mouth with his penis. She said that she started gagging and felt like vomiting.*
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> *[40] The complainant said that the Accused pulled her seat back and came on top of her. She said that he pulled her tights off and penetrated her vagina with his finger and then with his penis. She said she felt pain when he penetrated her vagina. She said that she could not scream because his weight was on her chest. She said that his finger went inside her vagina.*

She said that he penetrated her vagina with his penis for about one minute. She said that he ejaculated outside on the seat and then wiped his semen with a curtain cloth. After that he went back to his seat.

[41] The complainant said that the Accused dropped her off at Rosy Hut and gave her $20.00 to buy a cake. She said that the Accused returned after about 30 minutes and drove her to Ashika's house for her birthday celebration. Ashika was a fellow church member. After dropping the complainant the Accused went away and returned in the evening with his family for the celebration. The complainant said that she did not report the incident to anyone at the celebration. She said that she was not sure whether anyone would believe her and that she did not trust Ashika.

[42] The complainant said that after the celebration, Ashika dropped her off at her home. She said that she did not report the incident to her mum. She said that she went straight to bed crying.

[43] The complainant said that when she went to school the next day she was not able to concentrate on her studies. She said that with the assistance of her form captain she spoke to her form teacher, Ms Ashmita Lata and informed her that something had happened between her and her pastor.

[44] Ms Ashmita Lata told the court that the complainant had reported to her that her pastor, Ravinesh Chand had raped her. She referred the complaint to the school principal who then contacted the complainant's parents and the police."

[6] The appellant had given evidence and called two more witnesses. His evidence was as follows as per the summing-up:

"[52] The Accused in his evidence denies the allegations. He said that the allegations are not true. He said that on 21 March 2019 he did call the complainant's mother and asked both the complainant and her mother to accompany him to buy a birthday cake for the complainant. The Accused said that when he arrived at their home only the complainant accompanied him to buy the cake as the complainant's mother was busy. He said that he drove the complainant to Rosy Hut and gave her $40.00 to buy cake. He said that after dropping the complainant at Rosy Hut he drove his taxi to Luvuluvu to drop off some passengers and returned after about 45 minutes to Rosy Hut to pick up the complainant. He said that after picking the complainant he dropped her at their church for the evening celebration on her mother's request. He said that after dropping the complainant at their church he returned to his home. He said that he came back to the church with his family and celebrated the complainant's birthday with other church members. After the celebration he returned to his home with his family.

[53] The Accused said that on 13 March 2019, he saw the complainant and her mother fighting during a church crusade at Koronivia. He said that the argument was about the complainant going out with a boy and having love bites. He said that he counselled the complainant in church on that Sunday upon her mother's request. He said that he also requested the complainant's mother to take away the complainant's phone. The Accused said that he did not say to Ashika that he loved the complainant."

[7] The appellant's grounds of appeal are as follows:

'***Conviction***

Ground 1

That the Learned Trial Judge erred in law and in fact when he misdirected the assessors that 'consent is not a defence to a charge of sexual assault if the complainant is under the age of 16 years at the time of the alleged assault', thus causing the trial to miscarry.

Ground 2

That the Learned Trial Judge erred in law and in fact in not adequately/ sufficiently/ referring/ directing/putting the defence case to the assessors.

Ground 3

That the Learned Trial Judge erred in law and in fact when he failed to consider and also failed to direct the assessors to consider that the complainant failed to report the matter to her biological mother and she did not give any cogent reasons for not reporting the alleged incidents to her mother either on the same night of the incident or the next morning, thus creating a doubt on her credibility and truthfulness of the evidence.

Ground 4

That the Learned Trial Judge erred in law and in fact when he failed to consider and also failed to direct the assessors to consider that the injuries noted in the medical report 'was a vaginal laceration and abrasion', as such penetration to the vagina was not proven beyond reasonable doubt with medical evidence.

Ground 5

That the Learned Trial Judge erred in law and in fact when he failed to consider and also failed to direct the assessors to consider alternative count of sexual assault for count 2, 3 and 4 since medical evidence fails to prove any penetration to the mouth or vagina.

Ground 6

That the Learned Trial Judge erred in law and in fact when he failed to consider and also failed to direct the assessors to consider that the swab taken from the complainant's body or clothing did not detect any foreign DNA apart from the Complainant's DNA, thus creating a doubt on complainant's credibility and truthfulness of her evidence but supports the denial by the appellant.

Ground 7

That the Learned Trial Judge erred in law and in fact when he failed to consider and also failed to direct the assessors to consider that the delay in recent complaint implies that the complainant needed time to plot a story against the appellant, as she had motive to plot the allegations against the appellant because the appellant had caused her mother has confiscated her mobile phone.'

01st ground of appeal

[8] The appellant had been charged under section 210(1)(a) of the Crimes Act for 'sexual assault' by unlawfully and indecently assaulting a person which has the same elements as section 212(1) dealing with 'indecent assault'. There is another way of committing sexual assault as described under section 210(1)(b). Section 210(1)(a) and section 212(1) prohibit a person from unlawfully and indecently assaulting any other person. One distinction between the two sections is that section 210(1)(a) is an indictable offence tribal summarily while section 212(1) is a summary offence and the maximum sentence for the two offences varies accordingly. It is no defence to a charge under section 212(1) for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency except as permitted under section 212(3) subject, of course, to sub-section (4).

[9] When it comes to sexual assault under section 210 (1)(a) and (b), the age of the victim is immaterial. However, the legislature has stated that when sexual assault is committed by a person under section 210(1)(b) by procuring another (i) to commit an act of gross indecency or (ii) to witness an act of gross indecency by the person or any other person, procuring has to be without the consent of that person. Thus, lack of consent as an element of the offence of sexual assault of any person under section 210(1)(a) is excluded by necessarily implication when compared with section

210(1)(b). In other words, lack of consent is not an ingredient of the offence of sexual assault of a person of any age under section 210(1)(a).

[10] Therefore, though consent is a sufficient defence under the circumstances set out in section 212(3) to a charge of indecent assault on a girl or a boy under the age of 16 years, there is no such defence in the case of sexual assault under section 210(1)(a).

[11] Therefore, it appears that the trial judge was in fact referring to indecent assault instead of sexual assault, obviously inadvertently, at paragraph 23 of the summing-up which is consistent with the wordings in section 212(2) and (3).

[12] However, since the prosecution had not run its case on the basis that the victim had not consented to sexual assault, for lack of consent is not an element of sexual assault under section 210(1)(a) and the appellant too did not run his defence on the victim having consented to sexual assault but on a total denial and fabrication, I do not think that no material prejudice or substantial miscarriage had been caused by the directions at paragraph 23 as to adversely affect the guilty verdict.

02nd ground of appeal

[13] The trial judge had adequately summarised the defence case at paragraphs 52-60 of the summing-up.

[14] All the matters highlighted by the appellant's counsel in his written submissions on ground 02 are fresh arguments in appeal as why the victim had behaved the way she did or not behaved the 'expected' way during the whole episode. However, they do not seem to have been raised by way of cross-examination of the victim at the trial. Before drawing adverse inferences against her as the counsel has now done, the victim should have been confronted with those contentious points of fact at the trial and afforded an opportunity for her to explain, if possible. Attributing a stereotype behaviour to every victim of sexual abuse in appeal is no substitute for sound arguments based on tested facts. I do not see how principles in **Von Starck v. The Queen** [2000] 1 WLR 1270 have been breached by the trial judge in his summing-up.

No trial judge is expected to put for consideration before the assessors all conceivable (to human mind) scenarios including imaginary ones.

[15] As to the duty to leave all available defences with the assessors, the remarks by Chief Justice Ma in **HKSAR and Chau Yui Ming** FACC No. 2 of 2019 [2019] HKCFA 39 are timely. I quote:

> *31. In my view, some care needs to be exercised when defining the obligation to direct alternative verdicts. It is unhelpful, not to say confusing, for a judge to have to direct a jury to alternative options based on vague expressions such as "possible alternatives", "possible scenarios", "alternative defence scenarios" or "secondary defence scenarios……. Where, for instance, the defence's evidence and approach to the evidence is contrary to such alternative or possible or secondary factual scenarios, it would be confusing and wrong for a judge to have to direct a jury on those alternative factual scenarios. Were it otherwise, this would invite ingenious attempts to identify alternative scenarios, particularly after trial, in order to impugn a summing-up, these allegations bearing little or no resemblance to what was the reality at trial.*
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> *32. The answer to the question in what circumstances it would be incumbent on a judge to direct a jury as to the alternative options open to it is, I believe, to ask further whether there is an obvious alternative verdict which is supported by the evidence of that alternative……..*
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> *35. The way that the defence case is run on the facts is obviously relevant in determining whether there is sufficient evidence in support of an obvious alternative verdict. If a factual alternative does not arise in the way the defence has dealt with the facts and presented the case on the evidence (as opposed to the legal approach) this will in most cases be decisive……..'*

[16] The trial judge had no other defence available on evidence other than the total denial and alleged fabrication of the allegation. There was simply no evidential or factual basis for an alternative defence.

03rd and 07th grounds of appeal

[17] The complaints are focused on why the victim did not immediately report the incident to her mother in the night itself and the delay in complaining to the teacher on the following day with the alleged motive of fabrication.

[18] The trial judge had dealt with delayed reporting at paragraphs 60 to 63 of the summing-up. Again I do not find the trial counsel for the appellant having questioned the victim as to why she did not report the matter to her mother upon her arrival at home where she had gone straight to bed crying. There is nothing in the summing-up to show that the alleged sinister motive had been suggested to the victim. On the following day, she could not concentrate on her studies at school and disclosed that the appellant had raped her to her teacher.

[19] 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 (vide **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). If the delay in making the report can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness [vide **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622. A witness cannot be ambushed in appeal when he or she had not been challenged and given a chance to explain contentious matters at the trial.

[20] Given all the surrounding circumstances, I do not think that there is any merit in the appellant's complaint, for there is no delay as such in her complaint for it to be called belated. It had been made within a reasonable time. In the absence of any questioning as to why the victim did not complain to her mother, the arguments around that is nothing but speculation. Alleged motive appears to be very flimsy and not even suggested to the victim. However, at paragraph 53 the trial judge had referred to the appellant's counselling the victim and advising her mother to take away her phone.

04th and 05th grounds of appeal

[21] These grounds are based on medical evidence. The injuries noted in the medical report are a vaginal laceration and an abrasion. Dr Bakani had said that laceration was a tear while an abrasion is a bruise; a laceration can be caused by a blunt force trauma while an abrasion can be caused by friction or rubbing.

[22] The appellant argues these injuries do not prove vaginal penetration. The trial judge had correctly told the assessors at paragraph 47 that what weight they would attach to the medical evidence was a matter for them and the medical evidence of the vaginal injuries alone does not prove the charge but it is a piece of evidence that they may consider with all other evidence.

[23] In the first place, in law there need not be corroboration of victim's evidence either by medical evidence or otherwise. Nor can medical evidence alone prove a charge of rape. The evidence of penetration must come from the victim. In this case, the victim's evidence on penetration is as clear as it could be. Medical evidence had not ruled out penetration at all. In fact medical findings of vaginal laceration and an abrasion do lend some support of an invasion of her genitalia. Medical evidence may have been inconclusive for but did not rule out penetration, nor had the defence attempted to do so through the doctor. Penetration need not be violent or injurious to constitute rape. Even the slightest penetration is sufficient which can happen with or without serious injuries.

[24] Therefore, there was no basis for the trial judge to have directed the assessors on the lesser count of indecent assault instead of charges of rape based on medical evidence. This proposition is based on a wrong hypothesis that rape must necessarily and can only be proved by medical evidence and medical evidence alone, which is not the law.

06th ground of appeal

[25] The appellant challenges the victim's evidence on the basis of a negative DNA report. Ms Naomi Tuitoga, a senior forensic biologist had tendered the forensic report on the examinations of items in relation to the complainant and the appellant. She had confirmed that she was not handed any curtain cloth to test for the appellant's DNA. She had said that the swabs taken from the complainant's genitalia or clothing did not detect any foreign DNA, apart from the complainant's DNA. She had said that foreign DNA can be present in the bodily swabs for 92 hours but if the complainant had showered or cleaned herself before the swabs are taken they would not be able to detect any DNA.

[26] It does not appear from the summing-up that the victim had been asked whether she had cleaned herself before swabs were taken. In any event, her evidence was that the appellant ejaculated outside on the seat and then wiped his semen with a curtain cloth. Thus, it is no surprise that the DNA test returned negative for any foreign DNA. Therefore, lack of foreign DNA on swab samples taken from the victim's genitalia or clothing did not prove that she was not a truthful witness.

[27] Given those circumstances, trial judge's failure to give further directions based on DNA report as to the victim's credibility could not have caused any material prejudice or substantial miscarriage of justice.

[28] In my view, none of the grounds of appeal has a reasonable prospect of success in appeal.

Order of the Court:

1. Leave to appeal against conviction is refused.

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