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

CRIMINAL APPEAL NO. AAU 110 of 2022
[In the High Court at Suva Case No. HAC 70 of 2020]

BETWEEN	:	**ASHNEEL ASHIS CHANDRA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. Haritage for the Appellant**
	:	**Mr. L. Burney for the Respondent**
Date of Hearing	:	**27 October 2023**
Date of Ruling	:	**30 October 2023**

RULING

[1] The appellant had been charged with two counts of rape and one count of sexual assault and found guilty of both counts of rape and acquitted of the single count of sexual assault by the High Court Judge sitting alone. The charges were as follows:

> *'**COUNT ONE***
> ***(Representative Count)***
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***ASHNEEL ASHIS CHANDRA*** *between the 1st day of January 2021 and 31st day of October 2017 at Suva, in the Central Division, penetrated the vagina of* ***MMS****, a child under the age of 13 years, with his finger.*

COUNT TWO
(Representative Count)
Statement of Offence

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

Particulars of Offence

ASHNEEL ASHIS CHANDRA *between the 1st day of January 2012 and 31st day of October 2017 at Suva, in the Central Division unlawfully and indecently assaulted* ***MMS****.*

COUNT THREE
(Representative Count)
Statement of Offence

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

Particulars of Offence

ASHNEEL ASHIS CHANDRA *between the 1st day of November 2017 and 30th day of November 2017 at Suva, in the Central Division, penetrated the vagina of* ***MMS****, a child under the age of 13 years, with his finger.'*

[2] The trial judge sentenced him on 21 October 2022 to an aggregate sentence of 14 years of imprisonment which effectively became 13 years and 03 months (with a non-parole period of 11 years and 03 months) after the remand period was deducted.

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

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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:

> 2. *The victim's mother left when she was still very young. When they moved to live with her father's parents and sister, her paternal aunt take care of her. Her aunt got married and for a while lived in New Zealand and when she returned to Fiji in 2012, the victim went to live with her. She has been in the care of the said aunt since.*
>
> 3. *The Accused is the victim's father's cousin. He is therefore her uncle. It is agreed between the parties that prior to 6th February, 2020, the Complainant would often visit the Accused's residence for family functions. It is during these visits that the offences were committed.*
>
> 4. *The first count of rape is in respect of the Accused penetrating with his finger the vagina of the victim who was at the time, under the age of 13 years. The count is representative in nature meaning the Prosecution alleged more than one separate acts of offending within the period specified in this Count. The Court accepted as proved beyond reasonable doubt that on the day before the Accused person's elder brother's wedding in August 2017, the Accused had taken the victim to one of the rooms in the house where he penetrated her vagina with his finger while also touching himself. At the time, the victim was 12 years old and, being under the age of 13 years, was incapable of giving consent to such an act.*
>
> 5. *The victim said there were many such incidents of the Accused penetrating her vagina with his finger, too many to recall each one. The earliest incident she recalled happened when she was 5 years old.*
>
> 7. *The Accused was also convicted of rape in Count 3. The facts are that on the pritibhoj night before his wedding, the Accused had dragged the victim into the khorba room and had sexual intercourse with her there. The victim was under the age of 13 years at the time and therefore incapable of giving consent.'*

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

> ***CONVICTION***
>
> 1. ***THAT*** *the Learned Trial Judge erred in law and in fact in not conduction a '**competence inquiry'** required by section 10 (1) of the **Juvenile Act** before a child can give evidence to ascertain whether the child could give*

sworn evidence and if not unsworn evidence. In the Appellant's case the complainant was juvenile and as such failure to do so caused a substantial miscarriage of justice.

2. ***THAT*** *the Learned Trial Judge erred in law and in fact by excessively interfering with examination in chief and cross examining the State witness, which led to the Appellants not having a fair trial and hence a substantial miscarriage of justice.*

3. ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately directing herself the significance of Prosecution witness conflicting evidence during the trial.*

4. ***THAT*** *the Learned Judge erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the Complainant and as such there has been a substantial miscarriage of justice.*
5. ***THAT*** *the Learned Trial Judge erred in law and in fact in misdirecting and/or not properly and/or sufficiently himself specifically on the prosecution/defence evidence.*

6. ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing herself adequately any possible defence on evidence and as such by her failure there was a substantial miscarriage of justice.*

7. ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing herself and not giving cogent reasons for disbelieving the appellant who had given evidence on oath and as such there has been a substantial miscarriage of justice.*

8. ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing herself and not given cogent reasons for not believing the defence witnesses inter alia who had given evidence of abili and as such there has been a substantial miscarriage of justice.*

9. ***THAT*** *the Learned Trial Judge erred in law and in fact in finding the Appellant guilty on two counts and not finding him guilty on one count being the same complainant was an inconsistent verdict and as such there was a substantial miscarriage of justice.*

10. ***THAT*** *the Learned Trial Judge erred in law and in fact in not taking into serious consideration that the complainant failed to make a complain at the first reasonable opportunity but several years later caused a substantial miscarriage of justice.*

SENTENCE

11. ***THAT*** *the Appellant relies on Grounds 1 to 10 stated hereinabove.*

12. ***THAT*** *the Appellant appeal against sentence being manifestly hard and excessive and wrong in principal in the circumstances of the case.*

13. ***THAT*** *the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellants and not taking into relevant consideration.*

14. ***THAT*** *the Learned Trial Judge erred in law and in fact in not taking into consideration the Provisions of the Sentencing and Penalties Decree 2009 when sentencing the Appellant.*

15. ***THAT*** *the Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the Court records in this matter.*

Ground 01

[7] Section 10(1) of the Juveniles Act *inter alia* provides that:

> *"Where in any proceedings against any person for any offence ... any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; ...*
>
> *Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated."*

[8] Given her date of birth as 26 December 2005, at the time of giving evidence (22 October 2022), MMS (the complainant) was 17 years, 09 months and 07 days old. By no stretch of imagination, could MMS be considered a 'child of tender year'. The appellant has not adduced any reasons as to why the trial judge should have formed an opinion that MMS did not understand the nature of the oath and embarked on a 'competency test' with regard to MMS. For obvious reasons, neither counsel was of that view either. According to Juveniles Act, 'child' means a person who has not attained the age of fourteen years. Thus, MMS was not a child of tender years when she gave evidence. Nor MMS's evidence taken without an oath. She gave evidence under oath. Section 10(1) of the Juveniles Act does not seem to have been of any application here.

[9] For the argument sake, even if it was, the competency inquiry and the requirement for corroboration for child witnesses have no legitimate purpose in criminal proceedings involving children as victims of sexual abuse. Both the competency inquiry and requirement for corroboration for child witnesses in criminal proceedings are invalid under section 2(2) of the Constitution (vide **Kumar v State** [2015] FJCA 32; AAU0049.2012 (4 March 2015). This decision by the Court of Appeal seems to have interpreted section 10 of the Juveniles Act in conformity with the Constitutional provisions on children as required by section 173(1) of the Constitution. In **Kumar v State** the complainant was 08 years old at the time she gave evidence. Thus, she was in fact a child.

[10] In the appeal before the Supreme Court, Keith, J said in **Kumar v State** [2016] FJSC 44; CAV0024.2016 (27 October 2016) that:

> '*In my opinion, the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it to the judge to decide whether to conduct a "competence inquiry" before the child gives evidence, and for the requirement in section 10(1) of the Juveniles Act that the judge must do so to be abolished,....'*
>
> *The same also applies, albeit with one refinement, to the warning to the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child...*
>
> *...The more appropriate course is to follow what again has been the practice in England for almost 30 years, and for the requirement at common law for the judge to warn the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child to be abolished.*
>
> *.....In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred'*

[11] Thus, there is no compulsory 'competency test' on a child witness any longer. The basis for this ground of appeal is incomprehensible and the ground of appal itself is frivolous.

Ground 02

[12] The complaint is that the trial judge excessively interfered with the examination and cross-examination of state witnesses. It is difficult to understand on what material this

ground of appeal is founded. The appellate counsel was admittedly not the trial counsel. The appellate counsel had not admittedly consulted the trial counsel on this matter and no feedback received from him. The judgment does not contain any clue as to any such interference. According to the appellate counsel who supported the matter in court, the ground of appeal was based on his client's instructions.

[13] The written submissions filed on behalf of the appellant does not refer to a single instance of such undue interference by the trial judge. This ground also seems frivolous.

[14] It is unethical for an appellate counsel to allege excessive interference by the trial judge without consulting the trial counsel, especially if the allegations are based solely on the appellant's instructions. The reasons are many and some of them are as follows:

> *Accuracy and Responsibility: Allegations made in a court of law should be accurate and based on credible information. Appellate counsel has a responsibility to ensure that the claims made in court are truthful and well-founded. Relying solely on the appellant's instructions without verifying the claims through consultation with the trial counsel might lead to inaccurate or misleading statements.*
>
> *Duty of Candour: Attorneys have a duty of candour to the court. This means they should not make false statements, present false evidence, or conceal material facts. Alleging interference by the trial judge without proper verification could breach this duty.*
>
> *Professional Courtesy and Communication: Ethical norms within the legal profession often require communication and professional courtesy among attorneys involved in a case. It is generally expected that appellate counsel communicates with trial counsel to understand the nuances of the case fully. Failing to consult trial counsel could be seen as a lack of professional courtesy.*
>
> *Effective Representation: To provide effective representation, appellate counsel should have a comprehensive understanding of the case, which often involves consulting with trial counsel. This ensures that the appellate arguments are well-informed and well-prepared.*
>
> *Preserving Client Trust: While appellate counsel must advocate zealously for their clients, they also have a duty to maintain the trust and confidence of their clients. If the client insists on making unverified or potentially false allegations, it is the counsel's responsibility to explain the ethical constraints and potential consequences of such actions.*

[15] In summary, it is considered unethical for appellate counsel to make serious allegations against the trial judge without proper verification and consultation, especially when relying solely on the client's instructions. Legal ethics emphasize accuracy, responsibility, and professional communication, all of which are compromised if such serious claims are made without due diligence.

[16] Appellate practice entails rigorous original work in its own right. The lawyer who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product [See: ***In re Marriage of Shaban*** (2001) 88 Cal.App.4th 398, 408-410].

Ground 03 & 04

[17] Under these grounds of appeal on alleged inconsistencies in MMS's evidence, the written submissions of the appellant has simply repeated parts of the material in her police statement verbatim and not cited a single instance of a real and actual contradiction, inconsistency or omission brought out in cross-examination at the trial. Effectively, the appellant's counsel is asking this court to compare her police statement with her evidence. This court will not go fishing for such discrepancies in the evidence of prosecution or defence witnesses unless they had been brought out during their testimony under oath by pointing out the same to the witnesses and allowed him or her to explain, if possible.

[18] I do not find the trial judge having referred to any such contradiction, inconsistency or omission in MMS's evidence in the judgment. Therefore, I cannot be sure whether the alleged contradiction in MMS's evidence as to whether the appellant took MMS to his room when she was sitting in another room or when she was coming from the washroom had been highlighted during cross-examination. Similarly whether MMS disclosed what the appellant had been doing to her mother or aunt cannot be verified for lack of material at this stage. None of them have found a place in the judgment.

[19] Here again, it looks as if the appellate counsel had not consulted the trial counsel regarding the so-called contradictions, inconsistencies or omissions. It looks as if the

appellate counsel has simply read MMS's police statement and found some variations in her evidence with it as given in the judgment. Therefore, at this stage of the appellant's appeal on these appeal grounds are unsustainable.

[20] In **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022), the Court of Appeal said:

> *[65] Inconsistencies are bound to occur when witnesses recount a certain incident and more so when it relates to a sexual assault and the victim is a teenager. Thakkar J in the case of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (1983) SCC 217, has succinctly explained as to why inconsistencies are bound to occur in the testimony of witnesses and their effect. He stated: 'We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious' and went on to identify them. He said 'The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder'. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment'.*
>
> *Having said so, he held that "Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important 'probabilities-factor' echoes in favour of the version narrated by the witnesses' (at pages 222 and 223).*
>
> *[68] The dicta in the above cases were applied by this Court in the cases of **Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Krishna v The State** [2021] FJCA 51; AAU0028.2017(18 February 2021) and the impact of inconsistencies have been discussed in great detail. These decisions have in effect emphasized that the existence of inconsistencies by itself would not impeach the creditworthiness of a witness and that it would depend on how material they are. They also highlighted the requirement on the part of trial judges to adequately direct assessors as well as themselves on the impact of inconsistencies in arriving at a conclusion.'*

Ground 05

[21] The appellant's grievance is that the trial judge had not adequately addressed the prosecution and defence evidence in the judgment. There is no complaint by the prosecution to that effect.

[22] The thrust of the argument revolves around MMS's evidence that she revealed what the appellant had been doing to her since she was 05 years old when she saw him at his daughter's birthday in 2020 and had a panic attack. She had disclosed this to her aunt Monita when the aunt found her increasingly withdrawn and refusing to go to school and decided to inquire. The appellant submits that MMS had told her police statement that she told her mother (not the aunt) about the sexual abuses by the appellant. As already pointed out it is not in the judgment that such an inconsistency had been highlighted in MMS's evidence by the defence at the trial.

[23] The second complaint is that the trial judge had failed to consider Dr. Nikhil Kumar's evidence particularly that there were no recent injuries to the vaginal or anal area. The trial judge had indeed considered medical evidence at paragraph 21 of her judgment. The fact that MMS had no recent injuries should not cause any surprise, for the last sexual intercourse was in November 2017. The rest of the medical evidence clearly shows that there had been sexual intercourse as evidenced by her disintegrated hymen though the same could have happened due to strenuous physical activity such as horseback or motorcycle riding which, of course, were not applicable in the case of MMS.

[24] The appellant also seems to challenge how she managed to remember two instances relating to the first count and the third count given that the alleged sexual abuse had been going on for several years. MMS's evidence demonstrates that one incident of digital rape had occurred on the day before the appellant's brother's wedding day in August 2017 and the penile rape on the day before the appellant's wedding day. Therefore, once again there is no surprise that MMS could remember these two special days among numerous ordinary days of sexual abuse for several years.

Ground 06

[25] The argument here is that the learned trial judge had not adequately directed her evidence on any possible defences. The appellant's defence on the count 01 (and perhaps two) was a denial and a fabrication due to a dispute between Monita and him over insurance money and negligence case at Monita's clinic. On count 03 the defence seems to be that it was improbable that he could have committed the penile rape as he was always with some friends and family members. There was no other 'possible' defence that the trial judge could consider.

[26] The trial judge had considered the appellant's defence to both counts at paragraphs 22-32 and 50 but trial judge had not believed that the allegations were fabricated. It is unlikely that a series of events spanning over a long period of time could have been fabricated. 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)]

[27] The appellant complains that the trial judge had not accepted his 'alibi' defence. The Court of Appeal said in **Munendra v State** [2023] FJCA 65; AAU0023.2018 (25 May 2023):

> *'[13] Evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission (per Fatiaki, J in **Andrew Ian Carter v State** (1990) 36 FLR 125)…….*
>
> *[15] It is well established that it is for the prosecution to negative an alibi as in the case of self-defence or provocation [See **Killick v The Queen** (1981) 147 CLR565; 37 ALR 407, **R v Johnson** (1961) 46 Cr App R 55; 3 ALL ER 969 and **R v Taylor** [1968] NZLR 981 at 985-6] because by raising an alibi, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or*

*any reasonable possibility that the alibi was true [see **R v. Small** (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)].*

*[17] One way in which a prosecutor can try to refute an alibi defense is by showing that the accused never gave notice of alibi at all or there was no reasonable explanation for the belated alibi notice. On a trial before any court the accused shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused has given notice in accordance with section 125 of the Criminal Procedure Act, 2009. The mere fact that the necessary information has not been given within the stipulated time does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for alibi evidence to be called. However, non-compliance of the statutory period for alibi notice stipulated in section 125 of the Criminal Procedure Act, 2009 is a matter that goes to the weight of an alibi [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]. Requiring the accused to file notice of alibi in advance is to give the prosecution time before trial to take steps, if it so wishes, and to check the veracity of alibi notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the alibi.*

[18] The prosecution also can refute an alibi defense by questioning the accused's alibi witnesses and challenging their credibility. It can also lead evidence in rebuttal either before or at the discretion of the court after the defence evidence. The latter is a quasi-exception to the general rule that all the prosecution evidence must be adduced before it closes its case unless something arises totally ex improviso in the defence case which could not reasonably have been foreseen.

[19] Further, if the prosecution establishes beyond reasonable doubt that the accused was present at the crime scene by its own evidence, then alibi evidence has obviously failed to create a reasonable doubt in the prosecution case and the alibi would not succeed.

[20] However, in proving beyond reasonable doubt that the accused was at the crime scene, the prosecution must remove or eliminate a reasonable possibility of him being somewhere else according to the alibi evidence. This could be considered the intermediary position with regard to an alibi the result of which is that if the fact finders neither reject nor accept the alibi but alibi evidence still make them regard it to be reasonably true, then the accused will have to be acquitted.

[28] In this case, in my view, the appellant's defence to the third count of penile rape cannot be strictly considered an alibi, for the appellant and MMS were literally under the same roof and a few meters apart at any given time. Even if it is considered an alibi as contended by the appellant, the trial judge had in a cogent analysis of his 'alibi'

evidence had said that she admitted that the appellant was with his friends and family in the shed, singing and drinking grog and that women may have been in the khorba room but she did not believe that there was no time at all in that night that the appellant was alone.

[29] In other words, the trial judge had rejected that appellant's defence that there was no opportunity for him to commit the penile rape and it was not improbable that he committed the offending. According to MMS, the appellant's mother and grandmothers had seen him dragging her into the room but did not do anything. Thus, when the trial judge believed MMS beyond reasonable doubt that the appellant was present at the crime scene, then alibi evidence had obviously failed to create a reasonable doubt in the prosecution case and the alibi would not have succeeded.

Ground 07 & 8

[30] The appellant complains that the trial judge had not given cogent reasons for not believing the appellant and his witnesses particularly with regard to alibi.

[31] In Canada it has been held that in order to constitute an alibi, the evidence at issue must be determinative of the final issue of guilt or innocence. that such evidence contemplates that it is impossible for the accused to have committed the crime because, at the time of its commission, he was elsewhere [**R v MR** (2005), 195 CCC (3d) 26; [2005] OJ No 883 (QL) at para 29 (CA). There must be no 'window of opportunity' (vide **R v TWC**, [2006] OJ No 1513 (QL); 209 OAC 119 at para 2 (CA)]. The requirements of an alibi are strict; evidence that an accused had only a limited opportunity to commit a crime is not an alibi. Once properly raised, the Crown must refute the alibi beyond a reasonable doubt or the accused is entitled to be acquitted (vide **R v Allen**, 2017 MBCA 88 at para 8, 142 WCB (2d) 71 [Allen MBCA].

[32] **R v Cleghorn**, [1995] 3 SCR 9-160 NR 49 [Cleghorn] it was held by the Supreme Court in Canada that:

> *Disclosure of an alibi has two components: adequacy and timeliness. This principle was recently reiterated in R v Letourneau (1994), 87 CCC (3d) 481 (BCCA), where Cumming J.A. wrote for a unanimous court at p. 532:*

It is settled law that disclosure of a defence of alibi should meet two requirements:

(a) it should be given in sufficient time to permit the authorities to investigate: see R v Mahoney, supra, at p. 387, and R v Dunbar and Logan (1982), 68 CCC (2d) 13 at pp. 62-3 (Ont CA);

(b) it should be given with sufficient particularity to enable the authorities to meaningfully investigate: see R v Ford (1993), 78 CCC (3d) 481 at pp. 504-5 (BCCA).

Failure to give notice of alibi does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it.

[33] The trial judge had disbelieved the allegation of fabrication by the appellant particularly on the 01st count at paragraphs 50 and 52. It is very unlikely that MMS fabricated a series of sexual offending happening since she was 05 years old and specifically referred to the digital rape on the day before the appellant's brother's wedding and the trial judge was right in rejecting the *'alibi'* in the light of truthful nature of MMS's evidence.

[34] On the third count of penile rape, the alibi supported by the appellant and his witnesses were rejected by the trial judge for a very good reason that she could not believe that the appellant had no opportunity to be alone with MMS.

09th ground of appeal

[35] The appellant submits that the acquittal on count 02 and conviction on the 01st and 03rd counts amount to inconsistent verdicts.

[36] This ground of appeal is simply frivolous as the appellant was acquitted of the 02nd count for total lack of evidence at the close of the prosecution case and the prosecution conceded the same.

10thground of appeal

[37] The appellant submits that MMS had failed to make a complaint at the first available opportunity and the trial judge had not considered it.

[38] **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'.*

[39] 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

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

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.

[40] 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'.*

[41] 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) 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'*

[42] 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

[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

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.'*

[43] In as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare to direct the jury or assessors 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.

[44] 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.

> '*[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."*

[45] The assumption that a victim of sexual assault should report the incident as soon as possible is a topic of debate and controversy. The idea behind the recent complaint doctrine, which suggests that delayed reporting can affect the credibility of the victim's testimony, has been criticized by many advocates, researchers, and legal experts.

[46] There are several reasons why victims of sexual assault might delay reporting or not report the incident at all. Trauma, fear of retaliation, concerns about victim-blaming, lack of trust in the legal system, and societal stigma are some of the factors that can influence a victim's decision to delay reporting or not report the assault.

[47] It's important to recognize that trauma can significantly impact a victim's ability to immediately come forward and report the assault. Traumatic experiences can lead to feelings of shock, shame, guilt, and fear, which may prevent a victim from discussing the incident with others, let alone reporting it to law enforcement.

[48] Research in psychology and victimology supports the idea that delayed reporting is a common response to sexual assault. The trauma can affect memory and coping mechanisms, making it difficult for victims to process the experience and make immediate disclosures.

[49] Many experts and advocates argue for a more understanding and trauma-informed approach to handling sexual assault cases. This approach acknowledges the complexities of trauma and respects the varied ways in which victims may respond to their experiences. Law enforcement, legal professionals, and society, in general, are encouraged to be sensitive to these factors and not judge the credibility of a victim based solely on the timing of their report.

[50] In recent years, there has been a growing awareness of the need to support survivors and create an environment where they feel safe to come forward, regardless of when the assault occurred. Legal systems in various countries are also evolving to be more victim-centered, recognizing the challenges survivors face and working to address these issues in a more compassionate and understanding manner. It is high time that Fiji too adopts a similar approach on the issue of belated reporting.

[51] The complaint was late by 08 years from the first incident and 03 years from the last incident. MMS was brought up by the father since she was three (her mother had earlier deserted them) till she was seven when she want to live with the father's elder sister Monita. The appellant was her father's cousin. After almost every sexual abuse,

the appellant reminded her that if she reported the matter, her father (who used to drink and get violent) would hit her. She was scared of her father's behaviour. The fact that the appellant's mother and grandmothers turned a blind eye to the last incident would have convinced MMS of the futility of reporting the appellant to anyone. Even on an earlier occasion the grandmother had ignored the appellant's fingering MMS inside the room.

[52] It is clear that MMS decided to tell her aunt Monita in 2020 after the last incident to get the trauma that she was going through for years and depression off her mind as it was affecting her studies as well. Once she made the appellant's abusive behaviour known and Monita confronted the appellant, his grandmothers had accused her of lying and exonerated the appellant of all blame. This provides a glimpse of the family setting she was living and vindicates MMS's fears for not reporting the mater for so long. She was still a child when the last incident happened in 2020.

[53] The trial judge had considered the issue of delay and given convincing reasons on the lines discussed above at paragraph 46 and 47 why she had not considered the delay as affecting MMS's credibility. I see no error in her analysis.

Grounds 11, 12, 13 & 14 (sentencing)

[54] The appellant complains of the sentence as excessive, wrong in principle and based on irrelevant matters and all too common ground of 'not taking into consideration the provisions of Sentencing and Penalties Act.

[55] None of them carry any substance at all. Basically these complainants are hollow. The appellant is lucky to have got away with the sentence of 14 years for years of sexual abuse of MMS. The Full Court, if given an opportunity by the appellant's counsel by way of renewal, may consider revisiting the adequacy of the sentence.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused

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