

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

**CRIMINAL APPEAL NO.AAU 60 of 2022**  
**[In the High Court at Suva Case No. HAC 33 of 2020]**

**BETWEEN** : **SAJINESH CHAND**

**AND** : **THE STATE**

*Appellant*

*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Ms. S. Shameem for the Respondent**

**Date of Hearing** : **19 October 2023**

**Date of Ruling** : **20 October 2023**

**RULING**

- [1] The appellant had been charged with one count of attempted rape and two counts of rape and convicted in the High Court at Suva on the two counts of rape against his step daughter. He was acquitted of attempted rape.
- [2] After the appellant was found guilty of two counts of rape, the trial judge sentenced him on 06 July 2022 to an aggregate sentence of 16 years' imprisonment. The final sentence became 15 years and 07 months (with a non-parole period of 11 years and 07 months) due to the discount for the remand period of 05 months.
- [3] The appellant had lodged in person a timely appeal against conviction and sentence.

- [4] In terms of section 21(1) (a) & (b) 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide: Naisua v State [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No.AAU0015].
- [6] The trial judge had summarized the facts in the sentencing order as follows:
- [3] The victim was born on 29 December 2005. She was very young when her biological parents separated. Her mother had her custody. When her mother started a relationship with the offender she accompanied her mother to live with the offender at Omkar Road. The offender at the time worked as a casual carpenter. They lived in a basic two bedroom house.*
- [4] The first incident occurred in 2018 when the victim was 12 years old and was in primary school. Her account is that the offender sneaked into her bedroom at nighttime when her mother was fast asleep in the other room, gagged her mouth with a pillow to stop her from raising alarm, forcefully removed her undergarments and had sexual intercourse with her. He threatened to kill her if she reported to anyone.*
- [5] The second incident was a representative count. That incident occurred in 2019 when the victim was 13 years old and her mother had gone out to*

*visit some relatives. The offender sneaked into the victim's bedroom, gagged her mouth with a pillow, forcefully removed her undergarments and had sexual intercourse with her. When she went to clean herself in the bathroom she noticed that she was bleeding from her genitalia. She did not report to her mother because she was scared of the offender.*

[6] *The abuse was exposed when a female relative of the victim questioned her why she did not have her menses for over a month.'*

[7] The State led the evidence of victim, her biological father, her aunt and a medical officer. The appellant remained silent.

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

**'Conviction:**

**Ground 1:**

*THAT the Learned Judge erred in law and in fact when he did not take into account the delay in reporting by the complainant.*

**Ground 2:**

*THAT the Learned Judge erred in law and fact when he relied on the inconsistent and contradictory evidence given by the complainant and the witnesses to convict the appellant.*

**Ground 3:**

*THAT the police failed in its duty to do a proper investigation into the alleged complaints and therefore, a grave miscarriage of justice has occurred.*

**Ground 4:**

*THAT the Constitutional rights of a fair trial of the appellant was violated as he was not given a fair trial and this caused a gross miscarriage of justice.*

**Ground 5:**

*THAT the complainant, the complainant's father and the complainant's aunt conspired to frame the appellant to gain custody of the complainant.*

**Sentence:**

**Ground 6:**

*THAT the sentence is too harsh and excessive and has a high non-parole period and this prevents the rehabilitation of the appellant.'*

**Ground 1**

- [9] The appellant challenges the evidence of the victim on the premise that she had not made a prompt complaint of acts of alleged sexual abuse which had occurred within the span of over a year. The first incident of rape occurred in November 2018 when the victim was 12 years old and was in primary school and the second incident related to a representative count where the incident occurred in 2019 when the victim was 13 years old. The matter was first reported to her aunt by the victim in January 2020.
- [10] The trial judge had admitted that the delay was substantial at paragraph 36 of the judgment but explained at paragraphs 37 and 38 the circumstances that had led to the delay and the reason for the delay namely the threat issued by the appellant that she would be harmed if she reported. It came to light when the victim was complaining of stomach pains and her father's brother's sister inquired from her about her having missed her menses for a month where she had revealed to her that the appellant had raped her. In the meantime, the father had obtained the temporary custody of the victim. After weighing up all the matters, the trial judge had concluded at paragraphs 39 that the victim had given truthful and reliable evidence and rejected the notion that she had fabricated the allegation.
- [11] 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<sup>1</sup> quoted the following observations from **People v. Gecom**, 324 Phil. 297, 314-315 (1996)<sup>2</sup> (G.R. No. 182690 - May 30, 2011) in

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<sup>1</sup> [https://lawphil.net/judjuris/juri2014/jan2014/gr\\_202122\\_2014.html](https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html)

<sup>2</sup> [https://lawphil.net/judjuris/juri2011/may2011/gr\\_182690\\_2011.html#fnt65](https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65)

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'*

- [12] 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.'*

- [13] In as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fair 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.

- [14] 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.’*

[15] I have no doubt that the victim had reported the matter at the first available opportunity and the delay is not due to any fabrication on her part.

### **Ground 2**

[16] The appellant submits that the trial judge had relied on inconsistent and contradictory evidence by the victim and other witnesses to convict him.

[17] However, on a perusal of the judgment, I cannot see the trial judge having referred to any material inconsistencies and contradictions. What the appellant now points out is alleged inconsistencies and contradictions with the victim’s police statement which were never raised during cross-examination of the victim by his trial counsel. Therefore, this court would not consider at all such alleged inconsistencies and contradictions as the victim was not confronted with them at the trial and allowed an opportunity to explain, if possible. In any event, the alleged inconsistencies and contradictions are in relation to the attempted rape charge of which the appellant was acquitted at the close of the prosecution case.

[18] The appellant has also raised queries about the prosecution not producing the bedsheet upon which the victim was raped causing bleeding in her. The complaint was made after more than one year and it is obvious why the investigators had not bothered to take the bedsheet as an exhibit and in any event the victim had not said that she saw blood on the bedsheet.

[19] The appellant has also questioned why the prosecution failed to obtain a DNA test when he (and the prosecution) had agreed for one. The state counsel has submitted that the child born to the victim had been given for legal adoption soon thereafter with the intervention of the Legal Aid Commission which due to issues of confidentiality could not disclose the location of the baby for a DNA sample to be taken and accordingly no DNA test was possible. In any event, the defence had not made this a trial issue as the defence counsel was fully aware of the above circumstances.

#### **Ground 3 & 4**

[20] The summary of the appellant's grievances under these grounds of appeal is that the police had not recorded a statement from the victim's mother, the investigating officer not being called to give evidence, not carrying out a thorough investigation, delay in arresting the appellant, reconstruction pictures not being given to the appellant etc.

[21] If the prosecution had not provided the defence counsel with all relevant disclosures to fashion the appellant's defence, it was for the trial counsel to demand the same at the pre-trial stage. No such application seems to have been made. If there were any material shortcoming in the investigation, the defence could have canvassed the same at the trial. The defence could have called the victim's mother as a witness as she remained with the appellant throughout. There is no substance in these complaints.

#### **Ground 5**

[22] The appellant alleges that the victim, her biological father and her aunt had conspired to get the custody of the victim and framed the appellant in pursuit of that objective.

[23] The circumstances under which the victim's father sought her custody is described at paragraph 27 of the summing-up. After the father picked the victim on a Saturday from the mother with a promise to return her to the mother on Monday, the victim had complained that she was not being given proper food and she did not want to go back to the mother. The father had thereafter informed the Department of Social Welfare and applied and obtained temporary custody of the victim from the Magistrates court.

On their way home, the victim had complained of stomach pain and when inquired by her aunt, the victim had revealed her having missed menses for a month and disclosed acts of sexual abuse by the appellant. Medical examination that followed supported the allegation.

[24] Thus the conspiracy theory in my view has little credibility.

**Ground 6 (sentence)**

[25] The appellant complains that the sentence is too harsh and the non-parole period is too close to the head sentence.

[26] The trial judge had arrived at the sentence in the following manner:

*[10] The maximum penalty prescribed for rape is life imprisonment.*

*[11] In Raj v State [2014] FJSC 12 Crim. App. CAV0003 of 2014, 20 August 2014, the Supreme Court observed that:*

*Rape is the most serious form of sexual assault... Society cannot condone any form of sexual assault on children... Sexual offenders must be deterred from committing this kind of offences.*

*[12] In Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court set the following tariff:*

*[24] The increasing prevalence of these crimes, crimes characterized by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.*

*[25] The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20<sup>th</sup> August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time*



*spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms. (per Gates CJ)*

*[13] I consider an aggregate sentence is appropriate to reflect the offender's total criminality. I pick 11 years imprisonment as a starting point, add 7 years to reflect the aggravating factors and deduct 2 years to reflect the offender's previous good character.*

*[14] The offender is sentenced to 16 years' imprisonment for the two counts of rape against his stepdaughter.'*

[27] Given the aggravating factors that the child victim was vulnerable due to her circumstances, the vast age gap between her and the offender, her being gagged with a pillow to prevent her from raising alarm, her being threatened from reporting the sexual abuse, the fact that rape was repeated within one year when the victim was 13 years old, her having experienced both physical pain and psychological trauma, the appellant being the victim's stepfather and his grossly breach of the victim's trust, the increase of the sentence by 07 years is justified. There is no sentencing error in this process.

[28] The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent [vide: **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20].

[29] The gap of 04 years between the non-parole period and the head sentence in no way violates this principle.

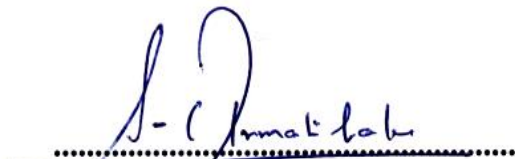
[30] If I were to adopt the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] in dealing with the sentence appeal *i.e.* when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered and whether in all the circumstances of the case the sentence is one that could reasonably be imposed,

I have no doubt that given the gravity of the offending the ultimate sentence is appropriate and well within the tariff.

**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**