

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0086 OF 2022
High Court No. HAC 42 of 2021

BETWEEN : **NASONI NAWANAWALAGI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in Person**
Ms. Ratukalou for Respondent [ODPP]

Date of Hearing : **26 March, 2024**

Date of Ruling : **4 April 2024**

RULING

1. The appellant was charged with the following offences in the High Court at Suva as per information dated 24 March 2021 as follows:

COUNT ONE

Statement of Offence

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

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2018 and the 31st day of December 2018 at Vatuwaqa, in the Central Division, unlawfully and indecently assaulted **P.T.N**, by squeezing her breasts.

COUNT TWO

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2019 and the 31st day of December 2019 at Suva, in the Central Division, intruded upon the privacy of **P.T.N**, by exposing his penis towards **P.T.N**, offending her modesty.

COUNT THREE

Representative count

Statement of Offence

RAPE: contrary to Section 207 (1) and 2 (a) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of January 2019 and the 31st day of December 2019 at Suva, in the Central Division, had carnal knowledge of **P.T.N**, without her consent.

COUNT FOUR

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAWANAWALAGI between the 1st day of September 2020 and the 31st day of September 2020 at Suva, in the Central Division, intruded upon the privacy of **P.T.N**, by exposing his penis towards **P.T.N**, offending her modesty.

2. The appellant pleaded not guilty to all the charges. The trial was held on 12 and 13 July 2022. The appellant was found guilty of counts 1 and 3 and not guilty of count 2 and 4. The appellant was sentenced on 15 July 2022, to an aggregate sentence of 15 years and 6 months imprisonment with a non-parole period of 10 years and 6 months.
3. On 21 July 2022 the appellant submitted a letter advising his intention to appeal against conviction in this matter. The letter was process through the Correction Service and filed in the court registry on 1 September 2022. This is considered a timely appeal because the delay is not due to any inaction by the appellant.

The Appeal

4. The initial letter of appeal dated 21 July 2022 from the appellant notified the court of the 1 ground of appeal against conviction. This was later amended through another submission filed in court on 28 March 2023 and 5 September 2023, this time the grounds of appeal submitted is 3 grounds. A further Amended Grounds and submission was filed in the court registry on 4 December 2023. The summation of the Grounds of appeal submitted by the appellant in support of his appeal against conviction is 7 in total. It will be individually assessed against the relevant principle of law to determine its value.

The Principles of law Governing Timely Appeal

5. This right to appeal that is timely, is set out in section 21 (1) (b) of the Court of Appeal Act; it states:

“(1) A person convicted on a trial held before the High Court may appeal under this part to the Court of Appeal –

(b) with the leave of the Court of Appeal... ..on any ground of appeal which involves a question of fact alone, or question of mixed fact and law or any other ground which appears to the court to be a sufficient ground of appeal."

6. For a timely appeal like this one, the test for leave to appeal against conviction and sentence is '**reasonable prospect of success**': Caucou v State [2018] FJCA 171; Navuki v State [2018] FJCA 172; and State v Vakarau [2018] FJCA 173; Sadrugu v The State [2019] FJCA 87; and Waqasaqa v State [2019] FJCA 144; that will distinguish arguable grounds [see Chand v State [2008] FJCA 53 , Chaudry v State [2014] FJCA 106; and Naisua v State [2013] FJSC 14;] from non-arguable grounds: Nasila v State [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Assessment of Grounds of Appeal

7. Before the grounds are assessed, a reminder from the Court of Appeal in Waqaninavatu v State [2023] FJCA 72, regarding the difficulty the court faces in grounds of appeal that lack clarity and specifics references in the manner the trial judge erred as a matter of law and facts. The court stressed the need to follow the rules of the court in drafting appeal grounds and submissions must be specific in what it claims:

Follow the Rules of the Court

*[14] Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting evidence in a coordinated way. This was clear derogation from the requirement in **Rule 35(4) Court of Appeal Rules** which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, **Rule 36(1) of the Court of Appeal Rules**, requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court"*

8. With above legal principles in mind, the court will now review the grounds of appeal submitted by the appellant.
9. **Ground 1** – allege that the trial judge did not consider everything in totality before convicting the appeal. This is one of those barebone allegation referred to

Waqaninavatu (supra) without reference to evidence at the trial. It is frivolous and have no merit.

10. **Ground 2 & 5** - allege that the trial judge erred in law and fact in not considering the delay in reporting the rape etc to the police or family, by the complainant. A similar allegation is raised in ground 5, alleging the need for more scrutiny of the circumstances of delayed complaint. These grounds will be addressed together.
11. The Court of Appeal in State v Serelevu [2018] FJCA 163 said the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”.

“In the case in the United States, in Tuvford 186, N.W. 2d at 548 it was decided that: -

*“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, **what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.**”*

[25] This is a matter that operates between promptness and veracity. According to learned authors on the subject, the fresh complaint rule evolved from the Common Law requirement of “Hue and Cry” test which was based on the expectation that victims of violent crimes would cry out immediately and which required proof of the details of the victim’s prompt complaint as part of the prosecution’s evidence.

[27] In the case of State of Andhra Pradesh v M. Madhusudhan Rao (2008) 15 SCC 582;

“The delay in lodging a complaint more often than not results in embellishment and exaggeration which is a creature of an afterthought. That a delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story. As a result of deliberations and consultations, also creeps in issues casting a serious doubt in the veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained. Resultantly when the substratum of the evidence given by the complainant is found to be unreliable, the prosecution’s case has to be rejected in its entirety”. (See: Sahib Singh v State of Haryana, AIR 1977 SC 3247; Shiv Rama Anr v State of U.P AIR 1998 SC 49; Munshi Prasad & Ors v State of Bihar, AIR 2001 SC 3031).”

12. In applying the **Serelevu** (supra) test in this case, the trial judge did specifically address the delay in making a complaint in paragraphs 22 to 24 of the Judgement. Not only was the trial judge correct, he was careful to explain the basis of his conclusion. That is all the scrutiny that was needed in the circumstances of this case. The submission written by a ghost writer for the appellant is heavy on overseas caselaw of no relevance to his claim, as regards the allegation he makes. This ground has no merit.
13. **Grounds 3 and 7** - allege that trial judge erred in law and fact when he failed to consider the inconsistent nature of the complainant's evidence, which make her evidence unreliable. This failure on the part of the trial judge has caused miscarriage of justice, because there was no independent assessment of the evidence.
14. Despite this claim, there are no specific reference made by the appellants to the inconsistencies alleged nor is here any example of what is referred in the 7th ground of appeal, the lack of independent assessment of the evidence by the trial judge.
15. In paragraph 19 and 20 of the Judgement the trial judge specifically addressed the issue raised by this ground of appeal. At paragraph 20 the trial judge observed:

"In the course of cross-examination there were no contradictions or omissions elicited. I did not observe any contradictions per se either..."
16. At paragraphs 15, 16, and 17 of the judgement covered the first circumstances of the rape which graphically covered the sexual violation of the complainant through the forceful actions of the appellant. This ground is without merit
17. **Ground 4** – This ground does identify the exact issue complained about. It is vague and without merit.
18. **Ground 6** - This ground allege that the trial judge erred in law and fact when he failed to direct himself or the prosecution to call witnesses such the Pastor and complainant's mother to give evidence at the trial regarding delay in the lodging of the complaint.
19. This ground is misconceived, the trial judge as a matter practice and procedure, does not decide the witnesses that will be called criminal proceedings. In Fiji that is the

prerogative of the Director of Public Prosecutions [DPP]. On the circumstances that finally led to the complaint reaching the police, the trial judge explained it as follows at paragraph 21:

“21. In cross examination the defence also suggested that the accused had been swearing at P.T.N and her brother and that they were angry with him and that she is making a false allegation against him. I would now consider these suggestions. P.T.N had been around 16 years when the complaint was made. Her mother has been sick. If we consider the nature of the allegation, it spends out to a period of almost 3 years. This also includes several different acts of sexual nature. If she wanted to fabricate a false allegation one would in the normal course expect her to make an allegation that she was abused recently? Fabricating a complicated allegation running back to 3 years is somewhat unusual. Further considering the circumstances, the nature and the demeanor of P.T.N, I am convinced she does not have the capacity or the courage to fabricate such a complicated false story. The Defence did not elicit any contradictions or omissions during her evidence. If a girl of this nature falsely fabricated such a complicated series of events one would expect some contradiction or omission to arise. Nothing of that sort was seen. In addition, if the P.T.N and her mother fabricated a false story due to anger or vengeance, in the normal cause of events one would expect the P.T.N and her mother to have proceeded to the Police and made a complain. That has not happened in this case. As the girl was crying after seeing the Accused with his penis out and the mother had enquired as to why she was crying when the P.T.N had disclosed what has been happening to her. This had been conveyed by the mother to another friend attending the same church. That friend has informed the Pastor who has passed the information to the Police. The manner in which the complaint was made clearly defeats and negates any inference of a false fabrication as this is not the conduct of a person making of a false allegation. Neither P.T.N nor her mother have initiated the complaint to the Police. It is by chance that this reaches the Police. In these circumstances the allegation that this is a false fabrication is extremely improbable.”

20. It is clear from the above circumstances, that the trial judge understood the importance of careful explaining from the evidence, the circumstances that attend the delay in the lodging of the complaints. This ground has no merit.

Assessment of Grounds of appeal Outcome

21. All the grounds of appeal submitted by the appellants have been assessed. All the grounds submitted have no reasonable prospect of success to warrant leave to appeal grant.

ORDERS:

1. Leave to Appeal is refused.



[Handwritten Signature]
Isikeli U Mataitoga
Resident Justice of Appeal