IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 68 OF 2023
High Court No. HAC 31 of 2021

BETWEEN : **NORMAN SNODGRASS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Ramanu I. for the Appellant**
Shameem S. for Respondent [ODPP]

Date of Hearing : **14 March 2024**

Date of Ruling : **2 April 2024**

RULING

1. The Appellant was charged with four representative counts of rape, on allegations that he had carnal knowledge, digital and lingual penetration of the Complainant's vagina, and penetrated her mouth with his penis without her consent. A representative count means the State is alleging more than one separate act of offending in each count.

2. For each representative count, the Prosecution is required to prove that between the specified dates, at least one act of rape of the kind alleged, occurred. (Section 70 (3) Criminal Procedure Act 2009; see also **Koro v The State** Criminal Appeal No: HAA0048 of 2002L 2 October 2002; **State v Kabaura** Criminal Case No. HAC 117/10, 9 August 2010, at [9]).

3. The appellant pleaded not guilty to the charges brought against him. At the trial in the High Court at Suva, the appellant was found guilty on all four counts.

4. He was convicted and sentenced to 12 years 10 ½ months imprisonment with 11 years non-parole on 27 July 2023.

Brief Facts

5. Norman James Snodgrass, you are before the Court to be sentenced having been found guilty and convicted after trial of four counts of rape.The victim was your de facto partner's niece who had come to live with you and your partner between 2019 and 2020 and attend school in Suva. She was about 14 – 15 years old and in Form 3 to Form 4 at the time of the offences.

6. The evidence at trial was that you had attended a parents and teachers interview at the victim's school. At home upon your return with the victim, you touched her vagina and penetrated it with your finger. You then pushed her onto her back and penetrated her vagina with your tongue. She told you to stop when you pulled down her pants but you paid no heed. She did not consent to what you were doing to her and you knew she was not consenting.

7. A few weeks later, you called her into your bedroom on the pretext of helping you look for something inside the room. You locked the room as soon as she was inside. You penetrated her vagina with your penis knowing she was not consenting. Following another, parents and teachers interview, you called her to help you print t-shirts in the nanny's quarters behind your home. Your modus operandi was the same. As soon as she was inside, you locked the room. You told her to suck your penis. When she refused, you pressed her mouth and put your penis inside knowing she was not consenting.

8. These were the incidents proven beyond reasonable doubt. The victim said you penetrated her vagina with your penis twice; digitally penetrated her two to three times, penetrated her vagina with your tongue three to four times, and penetrated her mouth with your penis four times. However, you are sentenced only for the representative counts proved in Court.

Appeal

9. On 22 August 2023, the appellant through counsel filed a Notice of Appeal pursuant to section 21(a) of the Court of Appeal Act against Conviction. The Notice of Motion also notified the 7 grounds of appeal against Conviction. The appellant's appeal was timely. All the 7 grounds of appeal alleged errors of law and fact by the trial judge. This being the case, leave to appeal is required under section 21(1)(b) of Court of Appeal Act 2009.

10. For a timely appeal like this one, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'**: **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: **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Appeal Grounds

11. **Ground 1** alleges 'that the trial judge erred in law and fact in that she failed to properly direct herself of the effect of the recent complaint made some 1 years after the first incident."

12. In support of this ground of appeal, the appellant argues that the complaints were belated and he should not have been convicted in the absence of recent complaints. The complaint was made 13 months from the first rape incident. The trial judge referred to the evidence of the appellant on recent complaint in paragraphs 48 and 49 of the Judgement. The trial judge accepted that there was delay in reporting but it was not unreasonable. It is that conclusion that is reached without a balance evaluation of both evidence adduced by the appellant and the complainant reasoning. When the trial judge concluded that "in assessing the evidence, the complainant struck me as reliable and credible witnesses": paragraph 52. The question is what evidence is the assessment based on. The trial judge's

analysis appears to be focused only on the explanation of the complainant without any reference to evidence of the appellant who gave explanations set out in paragraphs 30 to 41 of the judgement.

13. 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". I

"In the case in the United States, in **Tuyford** 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).*"

14. The High Court of Australia in **Graham v The Queen** (1998) 195 CLR 606, at 608

> *"held that a complaint made six years after an alleged sexual assault was not 'fresh in the memory' of the complainant for the purpose of s 66 at the time the representation—the complaint was made.[L] Gaudron, Gummow and Hayne JJ said:*
>
> > *The word 'fresh', in its context in s 66, means 'recent' or 'immediate'. It may also carry with it a connotation that describes the quality of the memory (as being 'not deteriorated or changed by lapse of time') but the core of the meaning intended, is to describe the temporal relationship between 'the occurrence of the asserted fact' and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.*
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> *Callinan J (Gleeson CJ concurring) noted that while the quality or vividness of a recollection could be relevant in an assessment of its freshness, contemporaneity was considered the more important factor."*

15. In light of the above legal issues, it is obvious that more analysis was needed from the trial judge in the evaluation of the totality of the evidence in this case on the issue of 'recent complaint.' That evaluation of the whole of the evidence did not take place. The evaluation has to be more than the trial judge merely restating the evidence of the complainant and the appellant and stating she believed the complainant's because she found her reliable and credible. This was a case where the prosecution relied primarily on the complainant's evidence and their case stands or fall on the at evidence: paragraph 44 - Judgement. This puts in focus the importance of the challenge the appellant's is making on lack of recent complaint evidence by the appellant. The trial judge should have addressed the appellant's submission that complaint was only made after the complainant became pregnant; inference being that if there was no pregnancy there may not have any complaint at all.

16. This ground of appeal has a reasonable prospect of success. Leave to appeal is granted.

17. **Ground 2** – Trail Judge erred in law and fact that she did fail to properly direct herself on the issues of consent.

18. The judgement at paragraphs 52 and 53 covered this issue adequately. There is no error of law there.

19. This ground has no merit and is dismissed. Leave to appeal is refused.

20. Grounds 3, 4, and 5

21. These grounds of appeal would be better analysed once the full court record of the trial is available. I noted that some of the issues inherent in the grounds of appeal submitted by the appellant if substantiated by the evidence in the court record, the trial Judge's reasoning in accepting the evidence of the complainant would be further examined given of the totality of the evidence of this case.

22. These are issues that may need further scrutiny by the full court. Leave to appeal is refused

23. **Grounds 6 & 7** - Failure to fairly evaluate contradictory evidence of the complainant

24. This ground alleges that the trial judge misdirected herself by not giving due weight to the evidence of the appellant. The issue of fairness in the approach of the trial judge is raised in these submissions. The submission of the following issues, by the appellants underscore his complaints:

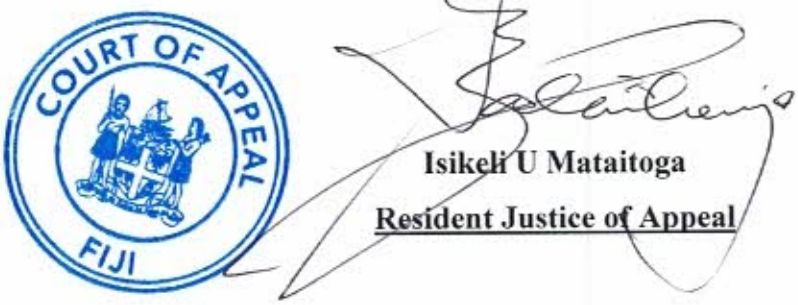
- How the pregnancy test originated?
- Who was it first related to?
- Any ulterior motive behind the test
- The result of the test was not considered by the court, although it raises issues of truthfulness of the prosecution evidence.

25. These are factors on their own do not suggest unfairness, but it may be and that determination is only reasonably made once the record of the trial is available. The issues raised will also be relevant to the appellant's complaint of lack of recent complaint in Ground1 of the appeal.

26. Leave to Appeal is refused.

ORDERS

1. Leave to appeal is granted to ground 1
2. Leave is refused to grounds 2 to 7.



Isikeli U Mataitoga

Resident Justice of Appeal