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

CRIMINAL APPEAL NO. AAU 121 of 2022
[In the High Court at Labasa Case No. HAC 58 of 2020]

BETWEEN : **LAISENIA VAKAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. I. Ramanu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **15 April 2024**

Date of Ruling : **16 April 2024**

RULING

[1] The appellant had been changed at Labasa High Court with the following count:

'Count 1
Statement of Offence

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

Particulars of Offence

LAISENIA VAKAU*, between the 1st day of December 2017 and the 31st day of December 2018, at Waitovure in Bua, in the Northern Division, unlawfully and indecently assaulted* **CR** *by massaging her vulva.*

Count 2
Statement of Offence

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

Particulars of Offence

LAISENIA VAKAU*, on an occasion other than that referred to in Count 1 between the 1st day of December 2017 and the 31st day of December 2018, at Waitovure in Bua, in the Northern Division, unlawfully and indecently assaulted* ***CR*** *by rubbing her vulva.*

Count 3
Statement of Offence

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

Particulars of Offence

LAISENIA VAKAU*, between the 1st day of December 2017 and the 31st day of December 2018, at Waitovure, in Bua, in the Northern Division, had carnal knowledge of* ***CR*** *without her consent.'*

[2] The High Court judge had convicted the appellant and sentenced him on 06 October 2022 to a final sentence of 17 years and 09 months of imprisonment with a non-parole period of 15 years and 09 months.

[3] The appellant's appeal 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 trial judge has said in the sentencing order as follows:

> *[2] It was proved during the hearing that you had sexually assaulted the Complainant on two occasions by touching her vagina between the 1st day of December 2017 and the 31st day of December 2018. It was further proved that you had penetrated the vagina of the Complainant with your penis without her consent on more than one occasion during the same period.*

[6] The complainant (who was 14 at the time of the incident) and one Sevuloni had given evidence for the prosecution while the appellant, his wife and one Mereoni had given evidence for the defence. The appellant's defence was a total denial.

[7] The appellant's counsel urged the following six grounds of appeal against conviction at the LA hearing.

Conviction:

Ground 1:

THAT His Lordship erred in law and in fact in that His Lordship failed to give proper consideration as to the credibility of the complainant in view of glaring discrepancies in her evidence of where the sexual intercourse took place and the number of times, considering what she told the medical examiner that there was no penetration or ejaculation.

Ground 2:

THAT His Lordship erred in law and in fact in that His Lordship failed to properly inform himself of the recent complaint evidence and to also give due consideration why no such complaints were made at the earliest opportunity, or the complainant yelling to raise attention.

Ground 3:

THAT the quality of evidence upon which the trial judge convicted the appellant was flawed, inadequate and not sufficient for the trial court to safely convict.

Ground 4:

THAT under all circumstances and in consideration of all evidence of the case, the finding of the learned trial judge is unsafe, unfair and unsatisfactory.

Ground 5:

THAT the demeanor of the complainant was not consistent during the giving of her statement to police, during her medical examination report and, during the trial which casts doubt on her credibility as a complainant.

Ground 6:

THAT the appellant was also severely prejudiced by the incompetent and inadequate legal representation based on the following reasons:

(a) Failing to lead or adduce evidence from both the State and Defence witnesses so as to inform the Court that the complainant had a vivid imagination of people she claimed to have sexually molested her or have sex with her, but turned out be all complete lies, such as:

- *The school headmaster having had sex with her as they were having an affair;*
- *She was having an affair with a boy in the mission compound who returned to his village as he was scared he could be in the same trouble as the complainant's uncle who was jailed;*
- *That a boy in school sexually molested her that was causing pain in her breast;*
- *That she was sending and receiving love letters to boys from her old school which was completely fabricated;*
- *Her own biological brother had also molested and raped her;*
- *There was the report from the headmaster that the complainant was sexually active and was selling sex for money;*
- *Failed to correct the picture painted in Court that it was the appellant who had initiated the move of the complainant to the Mission Compound and that she was under his direct care when both were not true;*
- *Failed to make the Court aware that the appellant and his wife had made arrangements to have the complainant transferred to the Juvenile Girls Centre in Suva and concerns about her behavior were becoming an issue;*
- *Failed to lay the grounds through the complainant of important aspects of her evidence that could be rebutted by Defence witnesses;*
- *Failed to call witnesses that could testify of the complainant's behavior, especially the girls who were with her, and in particular Wakesa who had denied to Police that she, according to the complainant's medical interview, saw a man sleeping beside the complainant the whole night but disappeared in the morning.*

Ground 1

[8] Under the 01st ground of appeal the appellant challenges the conviction on the basis that the trial judge had not considered the credibility of the complainant *vis-à-vis* the discrepancies in her evidence and that of Sevuloni as to where and how many times the sexual intercourse had allegedly happened and what she had told the medical examiner *i.e.* that there was no penetration or ejaculation.

[9] No medical evidence had been led by either party in the case. Therefore, what the complainant had allegedly told or not told the doctor is immaterial at this stage. As for

discrepancies, the trial judge had dealt with the inconsistency between the evidence of the complainant and Sevuloni on the nature of the alleged sexual abuse at paragraphs 37-42 of the judgment but for reasons given concluded that it had not affected her credibility.

[10] In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280) the Supreme Court of India held:

> *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time sense' of individuals which varies from person to person.*

[11] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) it was held:

> *[13] ....the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
>
> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

Ground 2

[12] The ground of appeal canters around the recent complaint evidence and belated reporting.

[13] 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 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."*

[14] The above test was adopted in Fiji in **State v Serelevu** [2018] FJCA 163. See **Prasad v State** [2020] FJCA 231; AAU02.2018 (20 November 2020) also. 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.

[15] **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*

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

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'.

[16] 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 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.

[17] 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

[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/

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'.

[18] 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'*

[19] 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.'*

[3] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html
[4] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

[20] Thus, as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare for the judges to direct themselves 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.

[21] The trial judge had devoted adequate space in the judgment to discuss the issue of recent complaint evidence (see paragraphs 35) and the issue of delay at paragraphs 33 and 34. Accordingly, the trial judge had not drawn any impermissible conclusion from Sevuloni's evidence on the complaint made to him by the complainant. On the totality of circumstances of this case, the trial judge had determined that the delay had been reasonably explained and cannot adversely affect the credibility of the complainant. He had discussed the legal parameters of the concept of credibility itself at paragraphs 25-27 and evaluated the complainant's evidence against them. The reasons for nor making a prompt complaint are at paragraph 14, 15 & 18 of the judgment. In fact according to paragraph 18 the complainant had brought the appellant's sexual abuses to the notice of his wife but she had not believed her as expected. Thus, there had been in fact a complaint made much earlier than she met Sevuloni. The trial judge's conclusion that the complainant was a credible and reliable witness is at paragraph 43 of the judgment.

Ground 3, 4 and 5

[22] The legal basis upon which these grounds are grounded appear to be that the verdict is either unreasonable or cannot be supported by evidence.

[23] By no stretch of argument, could I say that the trial judge had not considered the totality of evidence. For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test

where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ………..**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. **These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors**'*

[24] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[25] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)]. The trial judge had made a specific observation of the complainant's positive demeanour and deportment at paragraph 42 of the judgment.

[26] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention*

> *that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.*

[27] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carry out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

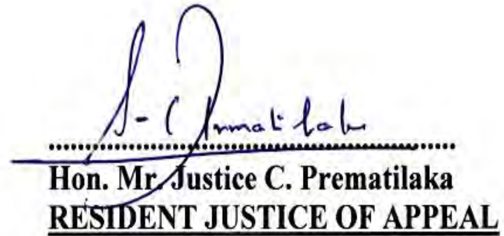
[28] Having considered the comprehensive judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. Nor has the appellant demonstrated why the trial judge could not have reasonably taken the view that he took on the totality of evidence.

Ground 6

[29] The appellant challenges the verdict of guilty on flagrant incompetency of his trial counsel. This court has laid down the judicial process to be followed when raising a ground of appeal based on criticism of trial counsel in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) which was approved by the Supreme Court in **Chand v State** [2022] FJSC 28; CAV0001.2020 (27 October 2022). The appellant or his appellate counsel has not complied with the same in this case. Therefore, this ground of appeal cannot be even considered at this stage.

Order of the Court:

1. Leave to appeal against conviction is refused.



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

Solicitors:

MIQ Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent