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

CRIMINAL APPEAL NO. AAU 066 of 2022
[In the High Court at Suva Case No. HAC 282 of 2020]

BETWEEN	:	**ABHINESH KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. R. Singh for the Appellant**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**19 December 2023**
Date of Ruling	:	**26 April 2024**

RULING

[1] The appellant had been changed with one representative count of rape contrary to section 207 (1) (2) (a) of the Crimes Act 2009 at Suva High Court.

[2] The High Court judge convicted the appellant on 29 July 2022 and sentenced him on 11 August 2022 to a head sentence of 14 years 7 months imprisonment with a non-parole period of 11 years 7 months imprisonment.

[3] The appellant's appeal against conviction and sentence is timely.

[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 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 prosecution evidence had been summarised by the trial judge in the sentencing order as follows:

> 1. *The offender is the victim's father's younger brother. He and another brother and their families had lived together with the victim's family. In 2012, the offender and his family left the extended family setting and moved to their own flat immediately next door to the victim's home. They continued to interact closely with the victim and the rest of the family next door, visiting each other and taking part in family functions and celebrating religious festivals together.*
>
> 2. *Sometime in May 2020, while the victim's mother was in Labasa, the victim and her grandmother were doing some work at the back of the house. When the victim went inside the house, the offender pulled her into her room, shut the door and pushed her onto the bed. He removed her pants and undergarments and after removing his own, had sexual intercourse with her without her consent. He covered her mouth with his hand. When he was finished, he left as if nothing had happened. The victim said the offender had done this to her on three other occasions.*
>
> 3. *The victim did not tell anyone as the offender had told her not to tell anyone or he would do something to her. He was aggressive and fought with the victim's father. She was afraid of him, she said. She also did not tell anyone at home as her family had not believed an earlier complaint she had made against an aunt's brother who had touched her inappropriately until she reported at school and the Social Welfare got involved.*

4. *Awareness programs at school encouraged students to talk about things they could not share at home. The programs referred to depression and suicide. The victim decided it was time to let someone know before she did harm to herself. The form captain of the victim's class noticed she was withdrawn and probed her for the reasons. The victim shared with her and the matter was taken up with the teaching staff and principal, and reported to the Social Welfare Department and the Police.*

[7] The appellant had preferred 13 grounds of appeal against conviction and sentence as follows:

Conviction

Ground 1

THAT the learned trial Judge erred in law and in fact by accepting the reasons for the delay of the complainant as reasonable when the evidence before the court suggested otherwise.

Ground 2

THAT the Judge erred in law and in fact by finding that the complainant's delay in reporting was because the complainant 'was afraid of him' when the evidence before the court suggested otherwise.

Ground 11

THAT the Judge erred in law and in fact by admitting the evidence of Maanhvi Singh, Rose Sharma, Seema Reddy and Sheemal Prasad as recent complaint when the complaint was not made at the first reasonable opportunity.

Ground 3

THAT the Judge erred in law and in fact by considering evidence that the appellant was an aggressive person and used to fight with the complainant's father and say obscene things about her when such evidence was of bad character and uncharged acts against the appellant and therefore, inadmissible.

Ground 4

THAT the Judge erred in law and in fact by failing to consider that the complainant presented a coloured version of the complaint at trial which showed embellishment and exaggeration and pointed towards fabrication.

Ground 5

THAT alternatively, the Judge erred in law and in fact by not giving weight to the prior inconsistent statements which go to the root of the matter and to the credibility and reliability of the complainant.

Ground 6

THAT the Judge erred in law and in fact by accepting the complainant's version of not providing full material facts in her statements to the investigating officer (IO) of the police as the IO had told her to provide such evidence in court when the IO disputed that she informed the complainant to shorten their statement and had not reason to lie.

Ground 8

THAT the Judge erred in law and in fact by not considering the evidence of WPC 2571 Sereima that she never told the complainant to alter her statement and keep it short as this was relevant to determine the credibility and/or reliability and/or truthfulness of the complainant.

Ground 10

THAT the Judge erred in law and in fact by failing to evaluate the material inconsistencies between the evidence given by the complainant and the other witnesses at trial.

Ground 7

THAT alternatively, the Judge erred in law by failing to appreciate that the IO's evidence is not to be believed then such actions of the prosecution was in breach of the appellant's constitutional right under section 14(2)(e) of the Constitution as the appellant was entitled 'to be informed in advance of the evidence of which the prosecution intends to rely and have reasonable access to that evidence.'

Ground 9

THAT the Judge erred in law and in fact by not considering the improbability of the prosecution's case given the other evidence that was before the Court.

Ground 12

THAT the Judge erred in law and in fact by failing to analyse the inconclusiveness of the medical reports pointed towards the innocence of the appellant and diminishes the credibility of the complainant when the complainant complained about the experiencing pain upon touch some 5 months after the alleged last incident raising doubt about the complainant's credibility given that Dr Vakamocea gave evidence that it is not possible for a person to experience pain or have residual injury 5 months after the incident as was alleged in the medical examination form.

Ground 13

THAT the Judge erred in law by not correctly applying the law on representative count in that the court failed to identify which particular alleged incident the court relied on when determining the guilt of the appellant.

Ground 14

THAT the Judge erred in law and fact when she failed to consider that if the Court had reasonable doubts about the alleged October 2019 incident which was discussed in great detail by the complainant at trial, then it must cast reasonable doubt on her entire evidence.

Ground 15

THAT the Judge erred in law and in fact when she failed to canvass the defence case in an objective, fair and balanced manner (if at all) which prejudiced the appellant.

Ground 16

THAT the Judge erred in law and in fact by not given her reason on why she believed the complainant over the appellant given that the appellant's evidence and denial of the incident was consistent with that to his wife and his reaction after being arrested and during the caution interview.

Ground 17

THAT the Judge erred in law and fact by failing to include the period of quasi custody as a mitigating factor when during such period the appellants constitutional rights are restricted.

Ground 18

THAT the Judge erred in law and fact by adding 6 years for aggravating factors which was harsh and excessive.

Ground 19

THAT the Judge erred in law and fact by not considering the mitigating factors.

Ground 01 and 02

[8] 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."

[9] 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.

[10] Australian Law Reform Commission[1] 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'.

[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[2] quoted the following observations from **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)[3] (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.

[1] 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/
[2] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html
[3] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

'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] 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.

[14] The trial judge had set out the complainant's evidence that highlights the reasons for the belated reporting at paragraphs 13, 16, 17, 22 and 51-53 of the judgment. How and why the complainant finally managed to reveal it set out at paragraphs 23, 24, 26, 31, 55 and 56 of the judgment. The trial judge had considered at paragraph 57 the complainant's reasons for the delay in reporting the matter as reasonable as the judge

found her testimony to be truthful and rejected the appellant's version of fabrication on the complainant's part.

[15] 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.'*

[16] Applying the above principles on how delay in reporting (set out at paragraph 50 of the judgment) should be assessed to the facts of the case as stated in the judgement and the trial judge's conclusion that there was a reasonable explanation for the delay, I do not see why the trial judge could not have reasonably taken that view and therefore, I do not see a reasonable prospect of this ground of appeal succeeding in appeal.

Ground 11

[17] **The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law by Eoin Jackson**[4] 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*

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

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'.

[18] 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.

[19] The appellant's argument that the evidence of Maanhvi Singh, Rose Sharma, Seema Reddy and Sheemal Prasad should not have been admitted as recent complaint evidence as the complaint was not made at the first *available* opportunity, should be considered in conjunction with his complaint of belated reporting under the 01st and 02nd grounds of appeal.

[20] There is nothing to indicate in the judgment that the trial judge had treated the evidence of above witnessed as 'recent complaint' evidence enhancing the consistency and thus, the credibility of the complainant. What has to be considered is whether the complaint was made at the first *suitable* opportunity within a *reasonable time* or whether there was *an explanation for the delay*.

[21] Going through the evidence of the complainant as narrated by the trial judge one cannot help but get the feeling that she in her view had come out of the complaint at the first *suitable* opportunity available to her and within a *reasonable* time in the totality of the circumstances she was placed in. There is no totally objective standard to determine what the first suitable opportunity is and what the reasonable time is. High degree of subjective considerations are involved here. The question is whether a reasonable person placed in the complainant's position as a victim must necessarily have brought the alleged sexual transgressions on the part of the appellant to the notice of a third party earlier then the complainant herself did. If the answer is yes, then the next question is whether there was a reasonable explanation on the part of the complainant not to have done so. Otherwise, historical rape charges would never be able to be proved in a court of law.

[22] I do not think that the trial judge was wrong to have answered these questions in favor of the prosecution given the totality of circumstances of this case. In any event, the prosecution had led the impugned evidence more to explain the sequence of events as to how the matter came to light rather than strict recent complaint evidence.

Ground 3

[23] This ground of appeal is based on evidence of alleged bad character and uncharged acts. The appellant's complaint is referable to the complainant's evidence that she felt that what he meant was that he would hit or murder her as implied from her evidence that the accused told her not to tell anyone or he would do something to her. Secondly, the complainant also said that the appellant was an aggressive person and used to fight with her father and he would even say obscene things about her and her sister to her father.

[24] There is nothing to suggest that these items of evidence have singularly or jointly played any significant role in the decision of the trial judge. A trained judge unlike a jury of laymen or a set of assessors is able to disregard any bad character evidence and decide the matter on admissible evidence unless the contrary is clearly demonstrated from the judgment. On the other hand the appellant himself in his evidence had portrayed him as a strict person and even said that the complainant fabricated the accusations because he was strict.

[25] The rest of the evidence particularly that of the complainant is sufficient to sustain the conviction sans the impugned pieces of evidence. The trial judge had specifically said that that the prosecution case rests substantially on the credibility of the complainant and accepting her account to be true would lead to a finding of guilt against the appellant. The question is whether or not the trial judge could have reasonably convicted the appellant on the evidence before her (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). The answer appears to be in the affirmative. There was clearly evidence on which the verdict could be based.

Ground 4

[26] The appellant's argument appears to be that the complainant has improved her version of events in her second police statement and in her testimony in court. The appellant describes this as embellishment and exaggeration and evidence of fabrication.

[27] This argument has its own limitations. While embellishment and exaggeration can be found in many testimonies they do not necessarily make the whole of the testimony a fabrication or the witness a liar. There are many reasons for this not so uncommon occurrence. Witnesses are not generally examined at length on in-depth details of an incident at the investigation stage by relatively less knowledgeable police officers compared to trained and experienced lawyers who elicit evidence in court and probe into even minute details either in examination-in-chief or cross-examination. Therefore, it is not unusual to find an improved version of events in court. The same applies to subsequent police statements also. Similarly, what may appear to be

embellishment and exaggeration may in fact be the hitherto undisclosed details of the incident.

[28] A trained legal mind such as a trial court judge could easily distinguish embellishment and exaggeration from truthful evidence.

Grounds 5, 6, 8 and 10

[29] These ground of appeal deal with alleged inconsistencies in the complainant's testimony.

[30] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) it was held [followed in **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)]:

> *[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).*
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> *'[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.*
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> *[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra)*
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> > *"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. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ..... (3) The powers*

of observation differ from person to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"

[31] In **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98 the Court of Appeal once again quoted from the following judgments of the Indian Supreme Court in relation to the importance attached to discrepancies, deficiencies, drawbacks, embellishments or improvements and other infirmities in evaluating the evidence.

*'[107] **State of UP v. M K Anthony** (1985) 1 SCC 505:*

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'

*[108] **State of UP v. Naresh** (2011) 4 SCC 324:*

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.'

[32] **Sivoinatoto v State** [2018] FJCA 68; AAU0049.2014 (1 June 2018) has the following relevant paragraphs on the same issue.

*'[9] When a court is dealing with the issues arising out of "contradictions", "omissions", it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of **Appabhai v. State of Gujarat**, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).*

> *"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."*

In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).

> *"A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential."*

*[13] In the case of **Sri Cruz Pedro Pacheco v. State of Maharashtra**,1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision):*

> *"Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself."*

[33] I cannot verify those alleged inconsistencies with the complainant's police statement/s referred to by the appellant without the complete trial proceedings. However, what is before me is the determination of the trial judge who has said at paragraph 59 of the

judgment that the contradictions and omissions presumably highlighted by the defence do not in her opinion shake the basis of the complainant's evidence. Thus, the trial judge had applied the correct test in evaluating the so-called inconsistencies, contradictions and omissions.

[34] 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**'*

[35] 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.

[36] 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)].

[37] 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).

[38] Having considered the judgment alone, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. On the totality of evidence before her, it was open to the trial judge to have reasonably convicted the appellant.

Ground 7

[39] The appellant's ground of appeal is based on section 14(2)(e) of the Constitution. His complaint appears to be in relation to the complainant's police statements.

[40] The respondent submits that the complainant's first complaint was disclosed to the defence on 23.10.2020 and the second statement was disclosed on 27.04.2022. The trial had commenced on 20 May 2022.

[41] If there was any concern arising from lack of sufficient time to prepare the defence as a result of the complainant's second statement being given on 27 April 2022 for the trial on 20 May 2022 that should have been raised with the trial judge. The trial counsel for the appellant does not appear to have done so. In any event, I do not think that the time

from 27 April 2022 to 20 May 2022 for consideration of the second statement of the complaint to get ready with the trial was so inadequate as to breach the spirit of section 14(2)(e) of the Constitution.

Ground 9

[42] Improbability of a testimony was dealt with in **Pell v The Queen** [2020] HCA 12 where the High Court off Australia accepted that the Court of Appeal assessed A's evidence as thoroughly credible and reliable and therefore the issue for the Court of Appeal was *"whether the compounding improbabilities caused by the unchallenged evidence required the jury, acting rationally, to have entertained a doubt as to the applicants guilt"* (paragraph 119).

[43] The appellant argues that given the nature of locks, placement of keys etc. it was improbable for the alleged incidents to have happened. These are essentially trial issues and without trial proceedings, I am not in a position to assess whether those alleged improbabilities *'ought to have caused a judge, acting rationally, to entertain a reasonable doubt as to the applicant's guilt of the offence'.* The prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but beyond reasonable doubt.

Ground 12

[44] The appellant argues that the trial judge had not analysed the inconclusiveness of medical evidence where Dr. Navakamocea had testified that it was not possible for a person to experience pain or carry any residual injury 05 months after the incident in the context where the complainant had complained of pain upon touch after about the same period of time after the last incident.

[45] The trial judge had indeed narrated the evidence of Dr. Burma and Dr. Navakamocea at paragraphs 33 and 40 and determined at paragraph 58 that the medical reports are not conclusive of penetration or of the appellant's guilt. Thus, the trial judge had not drawn any adverse inference against the appellant based on medical evidence.

[46] In great majority of cases, medical evidence cannot definitively prove or disprove an act of penetration which stands proved or disproved by the victim's evidence. Medical evidence is expert evidence of circumstantial nature which a trial judge is entitled to consider but not obliged to accept. A trial judge may reject it altogether or accept it fully or partially. In any given case, medical evidence may or may not be conclusive of penetration. When the medical examination happens after a considerable period of time of the incident the chances of medical findings becoming inconclusive is high; as time goes by it becomes higher and higher.

Grounds 13 & 14

[47] The appellant's contention is based on the representative count. In **Diani v State** [2015] FJCA 14; Misc.22.2012 (16 January 2015) it was said:

> *'[9] As far as her evidence of forced sexual intercourse was concerned, she gave an account of the events according to her recollection, given that she was subjected to numerous abuses over a period of three years. It would have been quite unrealistic to expect the victim to give a detailed account of every incident. That is why the State brought representative charges rather than individual counts. Furthermore, counsel for the appellant could have sought re-directions on the issues he is now raising on appeal if they were important to the defence case. Counsel chose not to seek any re-directions. Ground one is not arguable.'*

[48] The trial judge had correctly understood and stated the law relating to representative counts at paragraph 41- 44 of the judgment. The trial judge had at paragraph 60 had specifically mentioned the incident in May 2020 as one of the incidents of rape described by the complainant in her evidence. The judge need not have mentioned all of the incidents. The fact that the judge had not made references to other instances of rape does not necessarily mean that the judge had not believed the complainant regarding other instances because she had at paragraph 61 stated that she does not believe the appellant's denial (of all charges) and that the complainant has fabricated the allegations.

Grounds 15 & 16

[49] The appellant submits that the trial judge has not canvassed his case in an objective, fair and balanced manner and not given reasons why she rejected the defence evidence.

[50] The trial judge has narrated the defence case including the appellant's evidence at paragraphs 34 - 40, 46 and 54 of the judgment. Thereafter, in a single paragraph the judge had determined that she accepted the complainant's evidence as the complainant had struck her as a truthful witness (paragraph 57) and rejected the appellant's denial again in a single statement as untrue as she did not believe that the complainant had fabricated the allegations against him (paragraph 61).

[51] I had the occasion to consider the issue of inadequate reasons in somewhat detail in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023) and **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023) and the proposition of law, I arrived at is as follows:

> *'Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial.'*
>
> *'If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning of section 23 of the Court of Appeal Act. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within*

the scope of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.'

[52] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that there is adequate reasons for the rejection of the appellant's version. However, whether the inadequacy of reasons has resulted in a substantial miscarriage of justice as opposed to a mere error of law amounting a miscarriage of justice, is a matter for the full court to decide upon reading the transcript of trial proceedings. Therefore, I am inclined to grant leave to appeal on this ground of appeal.

Ground 17 (sentence)

[53] The appellant complains that the trial judge had not taken into account his quasi custody period as a mitigating factor.

[54] The judge had dealt with this matter at length paragraphs 12-21 of the sentencing order. I see no error in the reasoning of the trial judge in not taking the so-called quasi custody period in the matter of sentence as it was only discretionary on her part to do so as any other mitigating factor and not obligatory in the statutory scheme or by judicial precedents in Fiji.

Grounds 18 and 19

[55] The trial judge had given reasons for adding 06 years for aggravating factors at paragraphs 4 and 6 of the sentencing order which are reflected throughout the judgment particularly at paragraphs 23 and 26. No complaint can be made of the starting point of 11 years. 02 years for mitigation on his previous good character also cannot be faulted.

[56] Neither do I see any other mitigating factors disregarded by the trial judge other than personal circumstances which are of little migratory value (see **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[57] In **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018), Chief Justice Gates stated that the sentencing tariff for the rape of a juvenile should now be increased to between 11 and 20 years imprisonment. The appellant has received a sentence towards the middle of the tariff and a very reasonable non-parole period not always imposed on a person convicted of child rape and he cannot reasonably ask for more leniency.

[58] In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows:

> *'[2] The question we have to determine is whether we "**think that a different sentence should be passed**" (s 23 (3) of the Court of Appeal Act (Cap 12)?.....'*

[59] Therefore, 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The appellant's sentence is well within the tariff.

[60] I see no sentencing error in the overall sentence.

Orders of the Court:

1. Leave to appeal against conviction is allowed on the 15th and 16th grounds of appeal.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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

Solicitors:

Munro Leys for the Appellant
Office of the Director of Public Prosecution for the Respondent