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

CRIMINAL APPEAL NO. AAU 073 OF 2022
[Suva Criminal Case No. HAC 343 of 2020S]

BETWEEN	:	**RONALD MUNESH GOUNDAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
		Qetaki, RJA
		Rajasinghe, JA
Counsel	:	**Ms. Daunivesi, S for the Appellant**
	:	**Mr. Kumar, R for the Respondent**
Date of Hearing	:	**13 May 2025**
Date of Judgment	:	**29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with the reasons and orders of Qetaki, RJA.

Qetaki, RJA

Background

[2] The Appellant had been charged in the High Court in Suva with two counts of rape. The charges are as follows.

Count 1

Rape: Contrary to section 207(1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence at

Ronald Munesh Gounder between the 11th day of September, 2020 and 12th day of September, 2020 at Nasinu in the Central Division had carnal knowledge of **S.B.** without the consent of the aid **S.B.**

Count 2

Rape: Contrary to section 207(1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

Ronald Mukesh Gounder between 11th day of September, 2020 and 12 day of September 2020 at Nasinu in the Central Division, penetrated the vagina of **S.B.** with his tongue, without the consent of the said **S.B.**

[3] After trial before a Judge alone, the trial Judge had convicted the Appellant and sentenced him on 05 August 2020 to 11 years of imprisonment on each count (both sentence to run concurrently) with a non-parole period of 09 years.

[4] The Appellant's appeal only against conviction is timely.

The Facts

[5] The facts was summerised by the trial Judge in the Sentencing order as follows:

> *"2. The brief facts of the case were as follows. On 11 September 2020 (Friday), the date of the alleged rape, the complainant (PW1) was 15 years old. She was a class 8 student at a local primary school. The accused was 39 years old, at the time. He was a self-employed welder. The complainant and three of her friends went to the accused's house at Clifton Road, Valelevu. It was late Friday evening. On the way to the house, the accused bought three packets of Chinese whiskey from a nearby shop. The complainant, her three friends and the accused began to drink the whiskey at the accused's house.*
>
> *3. The complainant said, she drank about 6 to 7 glasses of whiskey. In the early morning of 12 September 2020, the complainant said she was so tired that she fell asleep, on the floor. When she woke up, the complainant said she saw the accused sitting on her lap, and he was taking off her pants. She said, she told him to stop. She said, the accused then slapped her and warned her not to resist or he will kill her. He later pulled down her jeans and panty.*

> *The accused then inserted his tongue into the complainant's vagina, without her consent. Then he inserted his penis into her vagina, without her consent. The complainant told the accused to stop, but he ignored her. The accused, at the time, knew the complainant was not consenting to the above sexual acts, at the time."*

Grounds of Appeal

[6] There were four grounds of appeal, as follows:

> ***Ground 1:*** *That whether the learned Judge erred by failing to provide an independent assessment of evidence to determine that the conviction is supported by totality of evidence.*
>
> ***Ground 2:*** *That the learned Judge erred by failing to properly consider the issue of delayed reporting of the complainant.*
>
> ***Ground 3:*** *That the learned Judge erred in law by failing to address the inconsistencies in prosecution witness evidence.*
>
> ***Ground 4:*** *That the learned Judge erred by interfering excessively during the trial process, causing substantial miscarriage of justice to the Appellant*

The Law

[7] In terms of section 21 (1) (b) of the Court of Appeal Act, the Appellant could appeal against his conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is "*reasonable prospect of success"* – see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU 0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU0057 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; CAV10 of 2013 (20 November 2013) from non-arguable grounds – see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019).

High Court

[8] The High Court judgment delivered on 19 July, 2022 was brief with 14 paragraphs. It reviewed the evidence of the prosecution in paragraphs 8 to 10 .It explained that at the

end of the prosecution case the parties agreed there was a prima facie case against the accused and the accused opted to give evidence but did not call any witness. The accused denied the rape allegation on oath. It summed up the evidence of the accused as follows: *The defence case was that the complainant did not know the complainant at all. He did not insert his penis into the complainant's vagina, and did not lick her vagina between 11 and 12 September 2020.*

[9] Paragraph [13] captures the reasons which persuaded the High Court to find the accused guilty of the two counts for which he was convicted. It states:

> *"13. Has the prosecution proven the accused's guilt beyond reasonable doubt? The court had carefully listened to and carefully considered the complainant's evidence as against the accused's evidence. The accused was 39 years old at the time, while the complainant was 15 years 5 months old. The court had also considered the demeanours of the witnesses, while they were giving evidence. Although the court found the teenager complainant had been naïve in staying out late with her friends and strangers at the time, I find her complaint on the rape allegation credible. Although it was stupid of her to drink Chinese whiskey with strangers at the time, I find her evidence on the rape allegations credible and I accept the same. I find the accused's evidence not credible, and I reject his sworn denials. I accept the complainant's evidence of rape allegation in count no. 1 and 2, and I accept her version of events on the same."* (Underlining is mine, for emphasis)

Leave Stage

[10] At the leave stage, the learned single Judge (Prematilaka, RJA), considered **Grounds 1, 2 and 3** together. He found that there is a failure on the part of the trial Judge to evaluate and analyse the totality of evidence and to give adequate reasons for the conviction, and it should be left to the full Court to examine the trial transcripts and decide whether the deficiencies in the reasons prevent meaningful review of the correctness of the decision leading to an error of law (and a substantial miscarriage of justice) and whether the verdict is still reasonable or can be supported having regard to the evidence.

[11] On the applicable legal test when similar grounds are raised, at a trial by the Judge assisted by assessors, the test has been formulated as follows: Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence 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.

[12] Put another way, the question for the 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 doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence-see **Kumar v State** AAU102 of 2015 (29 April 2021), **Naduva v State** AAU0125 of 2015 (27 May 2021). The court, in formulating the above test relied on a the decisions in **Balak v State** [2021]; AAU132.2015 (03 June 20210, **Pell v Queen** [2020] HCA 12, **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493.

[13] Keith, J in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018), stated: *"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".* In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), it was held that the trial court has a considerable advantage of having seen and heard the witnesses. It was in a better position to assess the credibility and weight and the appellate court should not lightly interfere and there was undoubtedly evidence before the trial court that, when accepted, supported the verdict.

[14] The learned trial Judge's analysis of the evidence, devoted paragraphs [8] to [10] only for the evidence of the complainant, and no discussions on other prosecution witnesses. Paragraph [12] was dedicated to the Appellant's denial, and in paragraph [13] the trial learned trial Judge had determined the evidence of the complainant to be credible and the Appellant's evidence incredible. It appears that the trial Judge had acted on what he believed based on the complainant's demeanour alone. The learned

single Judge concluded that there is hardly any analysis or evaluation of the totality of the evidence.

[15] The learned single Judge also discussed the duty of a trial Judge to give reasons for their decision especially where a conviction is entered, and quoted at length from a decision of the Supreme Court of Canada (per Binnie, J), in **R v Sheppard** 2002 SCC 26; [2002] 1 SCR 869 (2002-03-21). It relates to section 686 of the Canadian Criminal Code on "Powers of the Court of Appeal" somewhat similar to section 23 of the Court of Appeal Act. The principles in this case are in my view applicable in this case, especially, the requirement on trial judges to provide sufficient reasons that would permit appellate review of their decisions, apart from other considerations.

[16] **Grounds 2** (Delay in reporting of complaint), and 3 (Inconsistencies in prosecution evidence). The Single judge could not look into these as there is no mention of them in the judgment. As for the alleged delay in reporting, the record will reveal whether the victim's explanation, if any, for an unreasonable delay satisfies the "totality of circumstances " test adopted by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). On **Ground 3**, the existence of inconsistencies by themselves would not impeach the creditworthiness of a witness and that it would depend on how material they are- **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022). 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 importance: **Mohammed Nadim and Another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Krishna v The State** [2021] FJCA 51; AAU0028.2017 (18 February 2021).

[17] In conclusion the single Judge found that there is a failure on the part of the trial Judge to evaluate and analyse the totality of evidence, and give adequate reasons for the conviction. The appeal should be left to the full Court to look at the issues with assistance of the Court Record.

[18] On **Ground 4**, where the Appellant complains of undue interference in the conduct of the case by the trial Judge, and where both counsels confirmed that it was indeed the case, the learned single Judge agreed with the counsels for the full court to consider

the complaint with the aid of the transcripts of the trial proceedings in the light of the legal principles set out in **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022). The leave to appeal against conviction was allowed.

Appellant's Case

[19] **Ground 1**: The Appellant submits that the learned trial Judge did not make an independent assessment of the evidence to determine that the conviction is supported by the totality of the evidence. The learned trial Judge summerised the evidence adduced at the trial in paragraphs 8 to 12 of the Judgment and at paragraph 13, made reference to the facts.

[20] The Appellant submits that the learned trial Judge had stated that none of the other State witnesses witness the alleged rape at the crime scene. But he failed to analyse the evidence of the other State witnesses. Statements of the other prosecution witnesses have not been discussed at all. That the best practice is to set out the evidence and reasons to also assist the appellate courts in understanding whether the basis of the verdict of trial Judge is supported by evidence.

[21] The Appellant submits that not all the evidence presented at the trial has been analysed by the Judge from the reasoning, it appears that he was inclined to accept evidence from the State witnesses only, if they had been eye witnesses. The Appellant submits that this is highly erroneous as evidence from other prosecution witnesses could have been treated as circumstantial evidence to either prove or disapprove the complainant's version. Without discussing the other witness's evidence, it is difficult and uncertain to ascertain as to whether a correct assessment has been made.

[22] The Appellant points out that PW3, Isikeli Waqavatu in his evidence completely denied being with the complainant on the day of the incident. He confirms drinking at the Appellant's house with the complainant and another girl Mereoni between the month of June and July 2020 and not on the days as charged. This contradicts the version of the events leading up to the rape incident, where the complainant states she was with Isikeli on the day of the incident. This is an evidence that the Court would be prudent to assess. Secondly, the complainant's father, PW3 Jone Talemainaivalu,

in his evidence stated that the information about the rape came out after an argument between the daughter /complainant and Mereoni at the Nasinu Police Station after the complainant and four other girls were taken in for the missing mobile phone which belonged to PW3's wife, the complainant's mum. The issue of rape only came out through an argument between the complainant and Mereoni, where Mereoni shouted out about the rape.

[23] From the evidence of the complainant's father, PW3 Jone Talemainaivalu and of the complainant, it appears there was reluctance on the complainant to bring up the rape complaint. It appears that the complainant had every opportunity to lodge a complaint but did not. The Appellant submits that the complainant's reluctance stems from the fact that the story of the rape would have been more likely to be concocted. The Appellant submits that these pieces of evidence should have been analysed together and against all other evidence in assessing the credibility of the complainant and the creditworthiness of the prosecution's case before the Court. The Appellant argued that had that been conducted, the verdict would have been different.

[24] The Appellant also submits that there had been no analysis of delayed complaint and reporting, and how this affected the credibility of the allegation. The learned trial Judge appeared to have accepted the complainant as a credible witness based on her demeanour and age, but not on the spontaneity, probability, consistency and independence of the evidence. Further, that from the Court Record, it appears the learned trial Judge did not want the State to delve on the issue of belated complaint as it was the Court's opinion that it does not touch on the elements of rape considering which was the Court's main focus. The Appellant submits that such approach is erroneous, as it hinders the trial Court's ability to fully assess the credibility of the complaint and the complainant. The Appellant relies on the case **Attorney General of Hong Kong v Wong Muk Ping** [1987] 2 WLR 1033 where the Privy Council observed as follows:

> *".....any tribunal of fact confronted with a conflict of testimony had to evaluate the credibility of evidence in deciding whether the party who bore the burden of proof had discharged it. It was the commonplace of judicial experience that a witness who made a poor impression in the witness box might be found at the end of the day, when his evidence was considered in the light of all other evidence, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable might at the end of the day have to be*

rejected. Such experience suggest that was dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case capable of throwing light on its reliability."

[25] The Appellant submits that the full Court could independently assess the totality of the evidence by way of rehearing to determine whether there is any ground enumerated in section 23 of the Court of Appeal Act upon which the verdict should be set aside and if not, the verdict would not be disturbed. A reasonable doubt is whether there is sufficient credible and reliable evidence. The Appellant submits there is a doubt, based on the above analysis and in analysis of grounds (b) and (c), and there is doubt that there is sufficient credible and reliable evidence from the complainant on the rape allegations to convict the Appellant, and as such, the conviction of rape should be quashed.

[26] **Ground 2:** The Appellant complains about the delayed reporting of the allegations by the complainant. The Appellant states that the matter (the recent complaint evidence) is not discussed by the learned trial Judge in his Judgement. In fact, it is the Appellant's position that after one month of the alleged incidences, PW3 the complainant's father had taken the complainant and her friend Mereoni to the Nasinu police Station in relation to a missing mobile phone, and it was then when the complainant revealed that she was raped by the Appellant to PW3 and the matter was subsequently reported to the police station. There appears to be great reluctance on the complainant's part to report the matter. It would appear that it was only due to her encounter with Mereoni at the police station, that the matter was brought up by the Appellant. Further, in her evidence she agreed to stealing the Appellant's phone (J2 Core) and that she told the Appellant that if he were to report about his stolen phone, she would tell the police that the Appellant raped her.

[27] The complainant goes further and in cross-examination said that in order to save herself from being blamed for theft, she brought up the issue of rape. Even in re-examination, when asked why she wanted to save herself, her long-winded explanation was that Mereoni said things to her and her family that is why she reported. The Appellant submits the responses from the complainant is not forthright and portrays her to be evasive and untruthful. These pieces of evidence raise alarm bells as to the credibility of the complainant and the truth of her complaint for rape,

and had it been taken with other evidence in this matter in its totality it would warrant a different verdict/outcome in this matter.

[28] The Appellant submits that according to **State v Serelevu** (supra), the test to be applied on the issue of 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 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 and explanation for the delay."*

[29] In **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622, it is stated:

> *"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The Court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delays does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depend on the facts and circumstances of the particular case. The routineness of the scene of occurrence or the residence of the victim of the offence , physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."*

[30] The Appellant submits that it is unclear whether the complaint was raised at the first suitable opportunity and whether the complainant had provided a reasonable and acceptable explanation for the delay in reporting, due to the absence of an analysis of the evidence by the learned trial Judge. The complainant did not want to inform her parents because the parents were church leaders and they were strict. She came out a month after the incident and only because Mereoni had brought out the same during their argument (Mereoni/Sofia) at the Nasinu Police Station.

[31] From the assessment of evidence it appears the complainant was not going to reveal anything to anyone but for the mere reason that Mereoni had brought it up. There is no evidence to suggest that there was any threat, force, coercion by the Appellant of anyone but for that matter to stop her from complaining. The complainant had the opportunity the next day to report the matter to the police when she had woken up with her friend Sereana, but she chose not to. The reluctance and delay in reporting by the complainant taken in the totality of the circumstances in this matter, is not reasonable or justified.

[32] **Ground 3:** The Appellant contends that the learned trial Judge erred in not addressing the inconsistencies in prosecution witnesses' evidence. The trial Judge has only summarised the evidence of the complainant in the judgment. Evidence from other witnesses have not been addressed as, it has been earlier noted, and that none of the witnesses was at the crime scene to witness the alleged rape. Therefore, the learned Judge did not address any inconsistencies or circumstantial evidence. The Appellant submits that there were inconsistencies in the prosecution evidence amongst the State witnesses and these inconsistencies were material to the allegations. The other State witnesses were the complainant' father, the doctor who medically examined the complainant and one of the complainant's friends namely Isikeli Waqavatu aka Ziggy who accompanied them to the Appellant's house. The other two prospective witnesses who were with the complainant and the Appellant on the date of offending, Mereoni and Sereana were not called to give evidence in Court.

[33] The Appellant had highlighted the following inconsistencies in the prosecution witnesses' evidence:

> *(a) PW2 Isikeli Waqavatu aka Ziggy had testified that he had left the Appellant's house to take Mereoni home, while the complainant and Sereana remained behind;*
>
> *(b) According to the Appellant, the complainant had testified that the perpetrator had a tattoo on his neck and it was also proved that PW2 had a tattoo on his neck and not the Appellant. The learned trial Judge did not address this aspect in the judgement. This piece of evidence came out in cross-examination of PW2, who confirmed he has a star tattoo on his neck (page 379 Court Record).*

These inconsistencies should have been discussed because it touches on the element of identification of the perpetrator.

[34] The Appellant submits that PW2 Isikeli Waqavatu aka Ziggy had given evidence to state that he had gone to the Appellant's house with the complainant, Mereoni and Sereana sometimes in July 2020 and not during September 2020 as per the date of the allegation. This aspect has also not been addressed by the learned trial Judge in the judgment. The gist of PW2's evidence during trial is that he vehemently maintained he had taken the two girls to Ronald's place between June and July 2020 and in the cross- examination he states it was in July 2020, and he maintained he had not met the girls on 11 September 2020 as alleged. There are two contradicting versions put forth by the State as to who the complainant was with on the date of the alleged incident, which questions the integrity of the evidence before the Court.

[35] The complainant's statements to the police differed from her oral testimony during trial, for example when indicating the time she had met Sereana at the bus stand differ; the inconsistency in the time she mentioned she met the Appellant. These were available for the Court to consider although not raised with counsels. There was an issue about the Covid restrictions and whether it was in force which the Court did not explore to remove any doubt. The complainant had given two different versions on how she had looked at the Appellant during the alleged rape.

[36] According to **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280, witnesses cannot be expected to be human tape recorders. This case vividly dealt with inconsistencies in evidence, particularly in rape victims. No human testimony is perfect and no witness is under a memory test in court. No two witnesses have a similar memory of an incident or observe the same incident exactly in the same way.

[37] In **Nadim v State** [2015] FJCA 130, this Court held that be they inconsistencies or omissions both go to the credibility of the witness (**R. v O'Neil** [1969] Crim.L R.260). But, 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 witness cannot be annexed with undue importance.

[38] The Appellant submits that the trial transcripts and Judges Notes in this matter, and as highlighted above strongly indicate the inconsistencies were material enough to warrant an acquittal, and as such the verdict of guilty in this matter should be quashed.

[39] **Ground 4:** The Appellant contends that the learned trial Judge erred by interfering excessively during the trial process, causing substantial miscarriage of justice to the Appellant. He quoted extensively from the judgment of this Court in **Lal v State** [2022] which discusses the circumstances where a trial Judge interferes with the trial excessively and sets a guide in that, the nature and extent of a Judge's participation in the examination of a witness is a matter within his discretion which must be exercised judicially. The Judge should keep the scale of justice in even balance between the State and the accused. See **R v Darlyn** (1946) 88 C.C.C.269; Yuill v Yuill [1945] 1 All ER 183 (C/A). However, it is wrong for a Judge to descend into the arena and the impression of acting as advocate (vide **Rv Flulusi (197 Crim.rim.App R378, 382).**

[40] The Appellant also referred to the principles in other cases, as in **Browilland v The Queen**[1988] 1 R.C.S 39, "*where the trial judge goes beyond the limits and by his conduct gives the impression of assisting counsel for the prosecution and raised some doubts as to his impartiality only a new trial can erase such doubts."* In **Wilde v The Queen** [1988] HCA 164 CLR 365, where the High Court of Australia on the application of section 6(1) of the Criminal Appeal Act 1912 (NSW) which is similar to the proviso to section 23(1) of the Court of Appeal Act, Fiji, held, *"that the proviso has no application where an irregularity has occurred which is such a departure from essential requirements of the law that it goes to the root of the proceedings where it can be said that without considering the effect of it on the verdict that the accused has not had a proper trial and where there has been a substantial miscarriage of justice. Nevertheless, there is no rigid formula to determine what constitutes such a radical or fundamental error and in the end no mechanical approach can be adopted and each case must be determined by its own circumstances."*

[41] In **Hussein v State** [2019] FJCA 108; AAU034.2015 (6 June 2019), this Court examined similar complaints of the trial Judge having continuously intervened and interfered with the trial process depriving the appellant from having a fair trial, set aside the conviction and ordered a new trial. The learned trial Judge had asked a lot

of questions from the complainant and gave the impression that he had been assisting State counsel and as such, was impartial towards him. The Copy Records show that there was interference from the learned trial Judge on the issue of delayed reporting, thereafter the Appellant submits that the Court had done thorough examination of the complainant on the issue of identity, in the early stages of cross-examination. The Appellant submits that such was very unfair for the Appellant and that interference deprived the Appellant of a fair trial (pages 354 to 357 and 360 to 369, Court Record). It is submitted, as a consequence the verdict of guilty for the two counts of rape be quashed and the Appellant be acquitted accordingly.

Respondent's Case

[42] The State has responded to Grounds 1 to 3 jointly as the grounds are similar in nature and can be grouped together for relevance and practicality.

[43] The State accepts that His Lordship at trial had not summarised in the judgment the evidence of all prosecution witness, although he was actually alive to the actual trial issues which was solely the credibility of the witnesses. In that regard, the learned trial Judge was not mistaken when he noted that no other prosecution witnesses, apart from the complainant had been present at the material time and place.

[44] The State submits that its reliance on the medical evidence which goes merely in support of blunt force penile/ vaginal penetration, but not actually conclusive to say that it has been the appellant who had penetrated the complainant's vagina at the material time. The State submits that the learned trial Judge had been left only with the respective testimonies of the complainant and the Appellant to determine the guilt or innocence of the Appellant and it would be unreasonable to say that the learned Judge had only relied on witness demeanour because the Record (Judges Notes pages 328-329) reliably indicates exactly when His Lordship had spotted the unreliability of the Appellant's defence vis-à-vis the haphazard but truthful and materially consistent evidence of the complainant.

[45] The State submits that in light of the Judges Notes and Transcripts, it can be said that His Lordship, being the sole arbiter of fact and law (*sans lay assessors)*, had been

actively and independently assessing the trial evidence although this was not reflected in the judgment. The State submits that in cross-examination, questions had been put to the complainant that she had stolen the Appellant's phone the next day and that the Appellant had asked the complainant about his phone. The line of questioning, the State submits, had surely and logically shown the learned trial Judge that the Appellant's outright denials and defence of alibi were unreliable and contrary to the questions being robustly put to the complainant during cross-examination. The State further submits that the Appellant's denials failed to create any reasonable doubt in the complainant's forthright evidence.

[46] The State submits that the evidence of PW2 (*alias Ziggy)* was unhelpful to either party because while PW2 claimed the complainant had been at the Appellant's house sometime in July 2020, it had become apparent that despite there being no remarkable memory marker for PW2 to recall as such, he was adamant he had not met the complainant and other girls on 11 September 2020.

[47] The State submits that the evidence of PW3 (*complainant's father),* was at best hearsay, as well as the evidence of PW4 (*Dr Burua)* who medically could not say that it was the Appellant who had penetrated the complainant at the material time.

[48] The State submits that had there been assessors, His Lordship at trial would have directed them in simple terms about the fact that they could accept the entirety of the witness's evidence or wholly reject it or accept certain parts and reject other parts. That it would be unreasonable to say there had been an actual failure of the evidence being independently assessed vis-à-vis the totality of the trial evidence. The very fact the learned trial Judge had observed that no other prosecution witnesses, apart from the complainant could speak about the material time and event shows the learned trial Judge was mindful of the relevant legal aspects, particularly ensuring that all parties receive a fair trial.

[49] On the delay in reporting, the State submits that it is axiomatic the learned trial Judge was aware of the delay of the reporting and the reasons advanced by the naive complainant which were due to her fears of parental retribution given her truancy. The reasons were plausible but more so, as the learned trial Judge was evidently

mindful that a recent complaint would not have meant that the complainant was actually raped. His was not taking any side rather, simply doing his duty of ensuring prosecution was put to proving its case beyond reasonable doubt.

[50] The State submits that PW3's evidence was clear, that he had heard the spontaneous argument at the Police Station between the complainant and Mereoni where Mereoni had taunted the complainant for wanting to argue despite having been raped. The State submits that that is how the rape allegations had surfaced and it was uncontroversial for the learned trial Judge to not have given it any weight given its hearsay nature. That if the learned trial Judge had given weighty consideration to the manner in which the complaint surfaced, it would have bolstered the complainant's credibility given its spontaneity. However, it would be incorrect to do so given the absence of Mereoni as a trial witness.

[51] As regards to the inconsistencies, the State submits there had not been illogical inconsistencies in the complainant's oral evidence, except for the issue of how long she had been raped. In that, after cross- examination, it was clarified that instead of a 02 hours rape ordeal, the offence transpired for about half an hour wherein for about 06 minutes the complainant had visually observed the Appellant raping her. The State submits that issue of the star neck tattoo was clarified vis-à-vis the complainant's Police statement and the complainant had admitted her mistake and accepted that it was not the Appellant who had such a tattoo but Ziggy. The Sate submits that according to the recorded trial evidence, there was no such material inconsistencies which had been left unexplained to have created a reasonable doubt in the complainant's evidence.

[52] The State submits that the learned trial Judge had clearly stated that he had found the complainant's evidence as being credible and the complainant's evidence certainly was consistent regarding her claims of being raped by the Appellant. The State submits it was reasonably open to the learned trial Judge to have convicted the Appellant based on the complainant's forthright evidence. Further, this Court is not prevented from carrying out a meaningful appellate review in light of the Transcripts and Judges Notes to properly assess and possibly uphold the reasonableness of the verdict.

[53] On Ground 4 of the appeal *(Alleged excessive judicial interference during trial)* the State submits that this was not the case. It submits that the questions to witnesses during trial actually indicates the learned trial Judge's firmness and steadfastness in his duties as the sole arbiter of fact and law *sans /in the absence of* lay assessors. The State relies on the case **Rainima v State** [2023] FJCA 190; AAU011.2019 (28 September 2023) reproducing paragraphs [46] to [56] of the Judgment therein, and cases quoted in those passages.

[54] The State submits that in consideration of the observations in **Rainima,** the defence and prosecution questions were not actually hindered while the learned trial Judge questioning had not prompted the complainant to come up with the rape allegation and both parties had been at liberty to ask further questions if they wished to do so. The State submits that, in the majority of instances, counsels from both sides remained undeterred in their respective questions. It is submitted that it is difficult to see how either the defence or prosecution had been in any way disadvantaged. The questioning and interventions were strong but fair, and certainly without prejudice to or bias against the Appellant as time and again the learned trial Judge dutifully reminded both Counsels of the Appellant's absolute right to a fair trial. That there were no lay assessors who could have misapprehended the learned trial Judge's questions and statements. The State submits that the learned trial Judge may have been in a situation where he may have perceived counsels (understandably*)* as wasting Court time on irrelevant matters and it is uncontroversial for any proper Judicial Officer to ensure Court time is not wasted *(together with Taxpayer funded resources).*

[55] The State submits the learned trial Judge transparently asked questions for relevant clarification and also reminded counsels of their bounden roles and duties which is important also. Further, there is no appearance of any bias or prejudice from the learned trial Judge toward either side. The State submits that perhaps the learned trial Judge's concerns at trial were justified because it could be said the defence, while cross-examining the complainant, had not been all too logical while even the Respondent can accept that the prosecuting counsel could and should have better prepared and ordered examination - in - chief questions.

[56] In the final the State submits that, no miscarriage of justice had actually occurred when the Appellant was properly convicted for two counts of rape, based on admissible, robustly tested, unimpeached and wholly credible evidence of the complainant which requires no corroboration. That this appeal ought to be dismissed.

Analysis

[57] This analysis is based on a careful consideration of the Court Record especially including the Judges Notes, the Judgment of the High Court, the grounds of appeal, the Ruling of the learned single Judge, Submissions of the Appellant and the State (both written and oral submissions), and the legal authorities cited the judgment. An important consideration in this appeal I think is the consideration of the duty of the trial judge to give reasons which are intelligible to enable an appellate court in cases that are appealed, review a decision and make a determination. Binnie J, in **R v Sheppard** (supra) commented on this aspect in paragraph 5, as follows:

> *"At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to no blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. The question before us is how this broad principle of governance translates into specific rules of appellate review."*

[58] The learned single Judge, whose assessment I accept and adopt in the context of grounds 1, 2 and 3 found that there is a failure on the part of the trial Judge to evaluate and analyse the totality of the evidence, and to give adequate reason for the conviction. The applicable legal test when issues raised in these grounds in a trial by the Judge assisted by assessors is: whether the evidence of the complainant has been assessed by the assessors to be credible and reliable but the Appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence 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 complainants 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.

[59] In other words, the question for the appellate court is: whether on 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 doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence: see **Kumar v State** and **Naduva v State.** In formulating the above test, the court relied on a line of authorities including **Balak v State (2021)** and **Pell v Queen ((2020).** With the ceasing of the practice of trial by Judge with assessors, the Judge remains the sole trier of facts, and it is not illogical or unreasonable that a trial Judge can reasonably be expected to take on the role and responsibility normally entrusted on assessors in the assessment of the evidence, in the context of cases such as this.

[60] **Ground 1:** The issue in contention is whether the learned trial Judge had failed to provide an independent assessment of evidence to determine that the conviction is supported by the totality of the evidence. The State accepts that the learned trial Judge had not summerised in the judgment the evidence of all prosecution witnesses. For the reason that he noted that no other prosecution witnesses, apart from the complainant had been present at the material time and place. At the trial, there were four witnesses called by the prosecution being PW1 the complainant, PW2 Isikeli Waqavatu alias Ziggy, PW3 Jone Talemainaivalu (complainants' father) and PW 4 Dr. Losana Burua. The Appellant gave evidence on his behalf.

[61] The hearing took two days (19 and 20 July 2022). In the judgment delivered on 29 July 2022 the Judge found the prosecution had proven its case against the accused beyond reasonable doubt on both counts 1 and 2, and found him guilty as charged on both counts and convicted the accused accordingly. The learned trial Judge discussed/ analysed PW1's evidence from paragraph 8 to 10 of the judgment. At the end of paragraph 10 of the judgment, the learned trial judge mentioned that three other witnesses were called by the prosecution, none of them were at the crime scene to witness the alleged rape. The evidence adduced by PW 2, PW3 and PW4 were not commented upon or analysed by the learned trial judge in his judgment.

[62] In paragraph 11 of the judgment, the learned trial Judge stated that at the end of the prosecution case it was agreed, that on the evidence before the court, there was a prima facie case against the accused. The Court agreed with the parties and ruled to that effect. The accused chose to give evidence and chose not to call any witness. In paragraph 12 of the judgment, the learned trial Judge discussed the accused's case, stating the defence case was very simple. There was no analysis of the accused's evidence recorded in pages 394 to 398 of the Record, except that the accused denied inserting his penis into the complainant's vagina, nor licked her vagina between 11 and 12 September 2020.

[63] In paragraph 13 of the judgment, the learned trial judge stated that the court had carefully considered the complainant' evidence against the accused's evidence, it considered the demeanour of witnesses while they were giving evidence, The learned trial Judge found the complainant's rape allegations credible and accepted the same. He found the accused's evidence not credible and rejected his sworn denials. *"I accept the complainant's evidence of rape allegation in counts no's 1 and 2 and I accept her version of events on the same. I reject the accused's denial on the same."*

[64] While the submissions of the State is noted, in my view, it is evident that the evidence tendered by PW2 (pages 375 to 380 of Record), PW3 (pages 380 to 386 of Record), PW 4 (pages 387 to 394 of Record) and DW1's evidences were not independently assessed nor analysed by the learned trial Judge. A large volume of evidence (in comparison to PW1's evidences which was assessed), was not assessed nor analysed. The logical effect of failure to assess, evaluate and analyse all the evidences of the prosecution and the defence is that the decision that result is open to criticism and challenge as the decision, in this case the conviction, is not supported by the totality of the evidence.

[65] This potentially if not in fact creates a doubt also as the failure of the learned trial Judge to evaluate, assess and weigh the evidences of the Appellant and the three other prosecution witnesses at the trial, leaves unaddressed and inconclusive, issues raised that touch on credibility, consistency, omissions, contradictions in evidence. The Court by such failure has also denied itself the opportunity to consider the circumstantial evidences arising from the evidence adduced by witnesses other than PW1 alone, noting that, it is desirable that all the evidence is carefully assessed and

evaluated to ascertain their impact or implications on the legal and evidential issues arising due to the elements of the charges and the defences. The decision is defective and may not be able to stand scrutiny in the appellate court.

[66] Applying the "test" in the circumstances I have discussed, upon the whole of the evidence, it was not reasonably open to the learned trial Judge to be satisfied of guilt of the Appellant beyond reasonable doubt. Ground 1 has prospect of success. It has merit.

[67] **Ground 2:** The appellant argues that the learned Judge failed to properly consider the issue of delayed reporting of the complaint. The issue of recent complaint evidence has not been discussed in the judgment. Indeed, the learned single Judge had commented on this aspect also. The complainant did not take the opportunity earlier to report the incidents of rape on her own volition. The complainant was reluctant to report the matter or share about the rape issue, and it appears from the court record that she would not have brought the matter up, had it not been for the complainant's encounter with Mereoni at the Nasinu Police Station. In her evidence she agreed stealing the Appellant's phone (J2 Core) and that she told the Appellant that if he were to report about his stolen phone, she would tell the police that the Appellant raped her. In cross-examination she went further in agreeing that, in order to save herself from being blamed for theft, she brought up the issue of rape. Even during re-examination, when asked, why she wanted to save herself, her long-winded explanation was that Mereoni said things to her and her family and that is why she reported (page 371 Record). The responses from the complainant is not forthright and portrays her to be evasive and untruthful. These pieces of evidence raise alarm bells as to the credibility of the complainant and the truth of her complaint of rape and had it been taken with the other evidence in this matter in its totality would warrant a different outcome/verdict in this matter.

[68] In **State v Serelevu,** the test to be applied on the issue of the delay in making a complaint is "the totality of circumstances test". There is also the approach in **Tuyford** 186, N.W. 2nd at 2d at 548, a United States case, that requires that the complaint should be made within a reasonable time. That the surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. In applying the totality of circumstances test,

what should be examined is whether the complaint was made at the most suitable opportunity within a reasonable time or whether there was an explanation for the delay. See also the case **Thulia Kali v State of Tamil Naidu;** 1973 AIR.501; 1972 2 SCr (3) 622. Because there is no analysis by the learned trial Judge on the complainant's delayed reporting, at this stage, it is unclear whether the complaint was raised by the complainant at the first opportunity and whether she had provided a reasonable explanation for the delay in reporting. **(See para 31 of Appellant's submission)**

[69] In consideration of the above, I am not satisfied that the complaint was made within a reasonable time and the totality of circumstances test was not met. **Ground 2** is allowed as having merit.

[70] **Ground 3:** The issue here is whether the learned trial Judge failed to address inconsistencies in prosecution witnesses' evidence? The learned trial Judge did not conduct and assessment and evaluation of the evidences of the other witnesses at the trial as he had done in relation to PW1's evidence. It follows that the judgment did not identify any inconsistencies, discrepancies, omissions, improbabilities or other inadequacies associated with evidences given by witnesses at trial. It will be difficult therefore to also comment on their effects in the context of the totality of the evidence, assuming there were inconsistencies etc, and whether, if they were taken into account, would there be reasonable possibility that it would create doubt to the extent of affecting the verdict of guilt. An examination of the Record especially the transcripts of the trial show inconsistencies in evidence by witnesses, especially PW1's evidence as against other prosecution witnesses including PW2 and PW3's evidence. The details and impact of the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies were raised by the Appellant which I accept-see paragraphs [32] to [35] above.

[71] It is established that the existence of inconsistencies by themselves would not impeach the creditworthiness of a witness and that it would depend on how material they are. In **Nadim v State** (supra) this Court held that be they inconsistencies or omissions both go to the credibility of the witness (**R. v O'Neil)** (supra), and the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. The broad guideline is that discrepancies which do not go to the root of the

matter and shake the basic version of the witness cannot be annexed due importance. I am satisfied that the trial transcripts and Judges Notes in this matter strongly indicate that the inconsistencies etc. were material enough to create a reasonable doubt on the prosecution case. This ground has merit and is allowed.

[72] **Ground 4:** Whether the learned trial Judge interfered excessively during the trial process? The transcripts reveal the extent in which the learned trial Judge had participated at the trial. It is alleged, and I as I understand it, accepted by the State, with offers of justifications, that the learned trial Judge had substantially intervened in the trial. The learned trial judge had asked a lot of questions from the complainant and gave the impression that he has been assisting State counsel and as such, was impartial against him. He had also been persistent in directing the prosecution and seemingly taken over the prosecution role.

[73] Perhaps, it is crucial in this discussion to remind ourselves of the role of a Judge in a criminal trial, in the broader backdrop of the effective functioning of a trial in an adversarial system of justice, which Fiji inherited from the English system of justice. There has been a plethora of judicial decisions on the role of the Judge in a criminal trial, and from a selected number of authorities, the following provide a guide:

(a) In **Lal v State,** this Court had considered a similar issue, stating: *"A judge has not only the right but also the duty to put questions to a witness in order to clarify and answer or to resolve possible misunderstanding of any question by a witness put to him by counsel and even to remedy an omission of counsel by putting questions which he himself thinks ought to have been asked in order to bring out or explain relevant matters. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put he can intervene to see that deficiency is made good. It is generally more convenient to do this when counsel has finished his questions or is passing to a new subject. The nature and extent of a judge's participation in the examination of a witness is a matter within his discretion which must be exercised judicially. The judge should keep the scales of justice in even balance between the State and the accused. See* ***R v Darlyn; Yuill v Yuill.***

(b) *It is wrong for a Judge to descend into the arena and the impression of acting as advocate (vide* ***R v Flulusi).***

(c) *The trial judge has a right and often a duty, if just is in fact to be done , to question witnesses, interrupt them and if necessary to call them in order he must do so within certain limits and in such a way that justice is seen to be done. When the trial judge goes beyond the limits and by his conduct gives the impression of assisting counsel for the prosecution and raised*

*some doubt as to his impartiality only a new trial can erase such doubts (vide **Browlland v The Queen)**.*

[74] The High Court of Australia, commenting on the application of section 6(1) of the Criminal Appeal Act 1912 (NSW) which is similar to section 23(1) of the Court of Appeal Act of Fiji held in **Wilde v The Queen** [1988] HCA 6; (1988) 164 CLR 365 that, the proviso has no application where an irregularity has occurred which is such a departure from essential requirements of the law that it goes to the root of the proceedings where it can be said that without considering the effect of it on the verdict that the accused has not had a proper trial and there has been a substantial miscarriage of justice. Nevertheless, there is no rigid formula to determine what constitutes such a radical or fundamental error and in the end no mechanical approach can be adopted and each case must be determined on its own circumstances.

[75] In **Hussein v State** [2019] FJCA 108; AAU034.2015 (6 June 2019) this Court examined similar complaints of the trial judge having continuously intervened and interfered with the trial process depriving the appellant from having a fair trial, set aside the conviction and ordered a new trial. As noted from the Records, there was interference from the learned trial Judge from the issue of delayed reporting, thereafter, the Court had done a thorough examination of the complainant on the issue of identity, in the early stages of cross-examination, which appear unfair to the Appellant. The interference had deprived the Appellant from a fair trial (pages 354 to 357 and 360 to 369 of Court Record).

[76] This ground has prospect of success. It has merit.

Conclusion

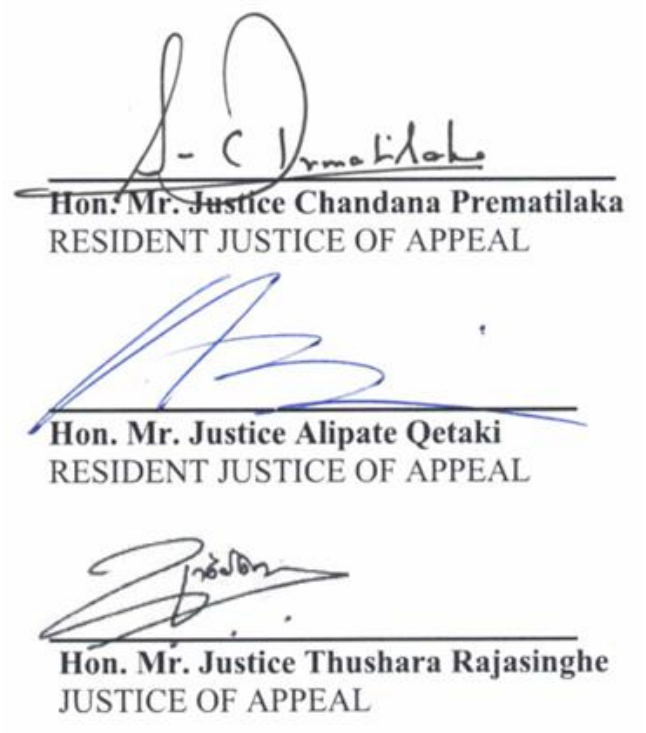
[77] I conclude that the learned trial Judge had failed to carry out an independent assessment of the evidences to determine that the Appellant's conviction is supported by the totality of the evidence; failed to consider the issue of delayed reporting of the complaint; failed to address the inconsistencies in the prosecution witnesses evidences, and had excessively interfered during the trial process causing substantial miscarriage of justice to the Appellant. The appeal is successful and Section 23 (2) (a) of the Court of Appeal Act applies.

Rajasinghe, JA

[78] I have read the draft judgment of Qetaki, RJA and agree with his reasons and conclusion.

Orders of the Court

1. *The appeal against conviction is allowed.*
2. *Conviction is quashed.*
3. *Appellant is acquitted.*



Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Thushara Rajasinghe
JUSTICE OF APPEAL

Solicitors
Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent