

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

CRIMINAL APPEAL NO.AAU 125 of 2016
[In the High Court at Suva Case No. HAC 077 of 2016]

BETWEEN : **NAVINDRA PRASAD**
: **SHAIENDRA SINGH**
: **RAVIND PRASAD**
: **AVINESH KUMAR**

Appellants

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **09 July 2020**

Date of Ruling : **10 July 2020**

RULING

- [1] The appellants had been indicted in the High Court of Suva on four counts of rape allegedly committed at at Sawani, Nausori in the Central Division contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.
- [2] The information consisted of the following counts.

FIRST COUNT

(Representative Count)

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

NAVINDRA PRASAD between the 1st day of January 2013 and the 30th of November 2014, at Sawani, Nausori, in the Central Division, had carnal knowledge of 'A.D.' without her consent.

SECOND COUNT

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SHAILENDRA SINGH between the 1st day of November 2014 and the 30th day of November 2014, at Sawani, Nausori, in the Central Division, had carnal knowledge of 'A.D.' without her consent.

THIRD COUNT

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAVIND PRASAD between the 1st day of December 2014 and the 31st day of December 2014, at Sawani, Nausori, in the Central Division, had carnal knowledge of 'A.D.' without her consent.

FOURTH COUNT

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

AVINESH KUMAR between the 1st day of December 2014 and the 31st day of December 2014, at Sawani, Nausori, in the Central Division, had carnal knowledge of 'A.D.' without her consent.

- [3] At the conclusion of the trial on 04 August 2016 the assessors' opinion was unanimous that the appellants were guilty of respective counts against them. The learned trial judge had agreed with the assessors in his judgment delivered on 05 August 2016, convicted them accordingly and on 09 August 2016 sentenced the 01st appellant to 13 ½ years of imprisonment with a period of 12 years of non-parole, the 02nd appellant to 13 years and 09 months of imprisonment with a period of 12 years of non-parole, the 03rd appellant to 13 ½ years of imprisonment with a period of 12 years of non-parole and the 04th appellant to 11 ½ years of imprisonment with a period of 10 years of non-parole.
- [4] The appellant's slightly out of time (by a couple of days) notice of appeal against conviction and sentence had been filed by the law firm Shirav Law on 12 September 2016. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction on 04 June 2020 along with written submissions. The state had tendered its written submissions on 08 July 2020.
- [5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucu v State AAU0029 of 2016; 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016; 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017; 4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015; 06 June 2019 [2019] FJCA 87 and Wagasaga v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.
- [6] Grounds of appeal urged on behalf of the appellant are as follows.

Ground One:

That the Learned Trial Judge erred in law and fact when he failed to fully and properly consider the issue of delayed reporting of the complaint thus questioning the credibility of the victim and the veracity of her complaint.

Ground Two:

That the Learned trial Judge erred in law and in fact when he failed to fully and properly consider the issue of delayed reporting and the apparent weakness in this evidence in light of the victim's mother not being called to confirm that such a complaint was made to her.

Ground Three:

That the Learned trial Judge erred in law and in fact when he accepted the victim's explanation of delayed reporting by speculating on what the victim's mother would not have wanted without this being confirmed by the victim's mother as such ought not to have been considered into evidence at all.

- [7] The summarized facts relating to the charges against the appellants could be gathered from the judgment as follows.

5. *It is undisputed that the complainant was below 16 years old at the time relevant to the charges. It is also not in dispute that the complainant's father was in jail and that the complainant was staying at her uncle 2nd accused's house. However, the position taken by the 2nd and 4th accused in cross examination was that the complainant never came back to 2nd accused Shailendra's house in Sawani after she ran away on 28/11/2014 after going to school.*

6. *The evidence of the complainant was that the 1st accused came to Shailendra's house and sent the two sisters out to wash his taxi. Thereafter he had closed the door, removed her clothes and had inserted his private part into her private part. He also had threatened her not to tell anyone. She said that she started bleeding and that she cried. It had happened in 2014 when she was at Shailendra's (2nd accused) house.*

7. *On a different occasion the 2nd accused Shailendra who is her mother's brother also had done the same thing to her. He had asked her to stay back without going to school to look after the visitors. He had come home by 9am and had pushed her on to the bed and had inserted his private part into her private part. He also had threatened her not to tell anyone. He had told her that "when Navindra did this thing to you, you kept quiet" Complainant said that Shailendra is her mother's brother and Navindra is her aunt's husband.*

8. During the school holidays the 3rd accused had come home to take some water. He had dragged her, made her fall down in the kitchen and had put his private part into hers. He had threatened her not to tell anyone.

9. In December 2014 the 4th accused who is her mother's first husband's son had been sleeping in the same room with her. In the night he had come on top of her, threatened her and had put his private part into her private part.

01st ground of appeal

- [8] The learned trial judge had said in paragraph 10 of the judgment on the issue of delay in reporting as follows:

The complaint to police was therefore made about 2 years after the incident. I find that the complainant clearly explained the delay in complaining, which is justified. The complainant was sheltered by the uncle (2nd accused), as her father was in jail. Obviously her mother had not sheltered her.

- [9] To understand what the explanation for the delay was, one needs to turn to the summing-up, for the judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing because in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court (vide **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020), **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Lasarusa Tikoigiladi v State** AAU 138 of 2016 (23 June 2020) and **Ravulowa v State** [2020] FJCA 93; AAU0090.2018 (1 July 2020)).

- [10] On a perusal of the summing-up, the following paragraphs appear to contain the reasons adduced by the complainant for her failure to report early.

**[33] She had run away from Sawani. She had met her mother in Nausori and had told her the things that happened to her. Her mother had told her not to report otherwise all of them will go to jail. Then she had told her father and her father had told her to report to police. When she was asked as to why she did not report for so long, she said that she told her mother several times but she did not get it reported.*

[34]She said that after everything happened she ran away to her friend's place in Sasawira. She had told her mother plenty times and then she had told her father... ..

[52] The complainant has made the report to the police about 2 years after the incidents happened. However, she says that she told her mother several times but her mother told her not to complain as the accused persons would go to jail. It is evident that the complainant was staying at her uncle Shailendra's house as her father was in jail. You heard her evidence and reasons she gave for the delay in complaining. It is for you to decide whether her delay in reporting to the police is justified or not. When deciding that, you may also consider her circumstances evident. That she was being sheltered by the 2nd accused who is her mother's brother. You may also consider her age and the social background. It is an admitted fact that she was under the age of 16 years in year 2014. Children do not have the same life experience as adults. Their understanding may be severely limited for number of reasons such as their age and maturity. They may be embarrassed and feel guilty about what happened to them. You may take into account all those factors when evaluating her evidence.

[11] It appears from the summing-up that the complainant had run away with her school friend on 28 November after school from Sawani (she was still in the 02nd appellant's house) and gone to her friend's place at Sasawira and then to Nakasi police station on 29 November 2014 but only reported that the 02nd appellant was causing trouble to her but not about rape as she wanted to tell her mother and father first. However, she had come back to the 02nd appellant's house only to run away for the second time with her friend and gone to her father where she told him that she had come because the 02nd appellant was hitting her but not mentioned about rape. She does not appear to have narrated the acts of sexual abuse to her friend whom she ran away with either. Thereafter, she had not gone back to the 02nd appellant's house. She claimed to have told her mother about incidents of sexual abuse when she met her in Nausori. Finally she and the father had gone to a mobile police station and complained.

[12] In this context, the appellants submit that the complainant had enough opportunities to bring the complaint to the police very much earlier and her explanations for the delay were unacceptable and cast doubt on her credibility. The trial judge had directed the assessors to decide whether the delay was justified or not in the light of what the judge had mentioned in paragraph 52 of the summing-up including the fact that she was being sheltered by the 02nd appellant when her father was jail and the mother too had not looked after her. The learned trial judge had repeated these reasons in

paragraphs 12 of the judgment and held that the complainant had clearly explained the delay.

- [13] The appellants have also submitted that the fact that the mother (or the father) of the complainant never gave evidence and lent support to her evidence that she had indeed complained of the sexual abuses to her allegedly committed on her by the appellants, should cast doubt of her explanation for the delay.
- [14] The counsel for the appellant also submits that it is evident from the summing-up that the complainant had told the police that her father had raped her though she had denied it at the trial (see paragraph 36 of the summing-up).
- [15] In this background the counsel for the appellant has submitted that the learned trial judge should have given a warning to the assessors and kept in mind himself the guidance set down in **Singh v The State** [2006] FJSC 18; CAV0007U.2005S (19 October 2006) as follows:

[29]..... The law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated. The reason for this rule was explained by the High Court of Australia in Jenkins at 123 [30] as follows:

"The rule exists for a reason. That reason is related to the potential unreliability of accomplices, an unreliability thought to be so well known in the experience of courts that judges are required, not merely to point it out to jurors, but to tell them that it would be dangerous to convict upon the evidence of an accomplice unless it is corroborated. The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by reference to a need to a need to look for corroboration."

[51] Thirdly, where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person, the assessors should be informed of

the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicts with a sworn statement the witness previously made. The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. Firstly, that the explanations are genuine. Secondly, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth (cf Gyan Singh v Reginam (1963) 9 FLR 105; Hari Pal v Reginam (1968) 14 FLR 218; Bijai Prasad v Reginam (1984) 30 FLR 13; R v Zorad [1979] 2 NSWLR 764 at 770-771). The need for these cautions is particularly acute in the case of a witness who is also an accomplice.

- [16] In my view, the directions on the evidence of an accomplice is not relevant at all for a delayed complaint of sexual nature for the reason that the underlying rationale for such directions upon the evidence of an accomplice is completely different to that of a victim of a sexual offence. Secondly, section 129 of the Crimes Act, 2009 makes it clear that no corroboration is required in sexual offence cases requiring no corroborative evidence of the victim of a sexual offence.
- [17] The directions on inconsistent evidence may also not apply directly to a delayed first complaint for the reason that in a delayed complaint the issue is not inconsistency but why the complaint was brought up belatedly. The appellants have cited **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) where it dealt with inconsistency of evidence as follows:

[79] The Petitioner relied on the case of Guan Singh v R [1963] 9 FLR 105 which held:

"It is the duty of the trial judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy of credence and, if so, what weight should be attached to it. The assessors and the trial judge, in determining the credibility of the evidence, must decide the preliminary question as to whether or not the explanation given by the witness as to the reason for such conflict is feasible and acceptable."

- [18] There is no authority submitted to me in support of the proposition that the aforesaid warning on inconsistent evidence should be given in respect of belated complaints as well.
- [19] Therefore, I think the guidance in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) on how to deal with a delayed complaint is best suited to the matter in hand where it was held

‘[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuvford** 186, N.W. 2d at 548 it was decided that:-

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

[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of **Thulia Kali v State of Tamil Nadu**, 1973 AIR.501; 1972 SCR (3) 622:

‘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 delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness 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.’

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

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

[20] In Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) the Supreme Court clarifying the decision in Praveen Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012) stated

'24.In Praveen Ram, this Court did not, and did not have to in the circumstances of that case, express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors.

25.....In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors. However, as was observed by this Court in paragraph [32] of its judgement in Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014), "an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."

- [21] In the light of the above decision, one cannot criticize the judgment of the learned High Court judge on account of lack of evaluation and reasons as in **Chandra v State** (supra) which affirmed **Praveen Ram** (supra) where the Supreme Court held that:-

"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."

- [22] With all due respect, I ponder whether the more accurate and correct test for setting aside a verdict by the Court of Appeal is that either (i) it is unreasonable or (ii) cannot be supported, having regard to the evidence in terms of section 23(1)(a) (against conviction) and (b) (against acquittal) of the Court of Appeal Act rather than the verdict being unsafe and dangerous. I do not have to consider the other two grounds in section 23(1) (a) and (b) in this discussion.
- [23] Coming back to the appellant's complaint, I have my doubts whether both the assessors and the learned trial judge have addressed the key issue of 02 years of delay by the complainant in reporting the sexual abuse complaints by applying the totality of circumstances test to determine (i) whether the complaint was made at the first suitable opportunity within a reasonable time (ii) if not, whether there was an explanation for the delay: a genuine and satisfactory explanation at that.
- [24] Of course, the learned trial judge cannot be faulted for not directing the assessors or addressing himself on the totality of circumstances test as **Serelevu** was decided in October 2018 whereas the trial judge dealt with the case in August 2016. Nevertheless, when the Court of Appeal considers the appeal now it cannot ignore but has apply the guidance in **Serelevu** to assess the impact of belated reporting of the alleged sexual abuses *vis-à-vis* the verdict of guilty in the overall context of section 23(1)(a) of the Court of Appeal Act.

- [25] Therefore, at this stage I am constrained to treat this as a question of mixed law and fact under section 21(1)(b) of the Court of Appeal Act though I must hasten to add that I cannot say that on facts revealed in the summing-up and the judgment alone there is a reasonable prospect of success in appeal as the complete appeal record is not before me.

02nd ground of appeal

- [26] This ground of appeal is inextricably interwoven with the first ground of appeal and I have already addressed it under the first ground of appeal. The absence of any support from the complainant's mother and father who were not called by the prosecution (while being part of the prosecutorial discretion) should be considered in the larger context of the complainant's belated complaint rather than as a separate ground of appeal. In this respect, in as much one could argue that no mother would come forward to say that she asked the daughter not to report sexual abuses perpetrated on her and therefore would not accept, even if called to give evidence, that she had received complaints to that effect, it is also possible to pose the question in the same breath *'would a mother ever discourage a daughter from reporting such abhorrent crimes committed against her daughter if she had in fact received complaints from the daughter?'*
- [27] On the other hand, as the learned trial judge had remarked, no reason was apparent as to why the complainant had made false allegations against not one but four appellants two of whom are not even directly related to her.

03rd ground of appeal

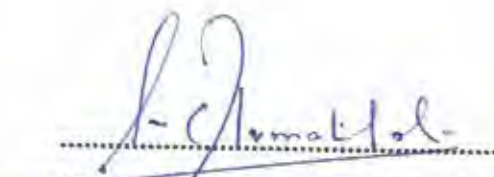
- [28] This complaint relates to the learned judge having accepted the complainant's explanation for belated reporting. However, it is not solely based on what the appellants allege to be speculative reasons. Among other matters, the learned trial judge had stated that *'Obviously, her mother would not have wanted her brother who is the 02nd accused and the other accused persons to be in trouble'*. However, one may also ask the question *'would the mother have wanted her daughter to suffer in silence in the face of horrendous acts of sexual abuses even at the hand of her own*

brother? Still one cannot say that the learned judge's reasoning is illogical or irrational. Anyway this ground too cannot be completely divorced from the broader issue raised under the first ground of appeal.

Order

1. Leave to appeal against conviction is allowed.




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