

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

CRIMINAL APPEAL NO.AAU 0028 of 2017
[In the High Court at Lautoka Case No. HAC 155 of 2013]

BETWEEN : **VISHAL KRISHNA**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. T. Lee for the Appellant**
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **17 February 2021**

Date of Ruling : **18 February 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009, two counts of rape contrary to section 207(1) & (2) and 207(1) & (2) (b) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 committed at Sigatoka in the Western Division between 01 April 2012 and 01 May 2013.

[2] The information read as follows.

'First Count

Indecent Assault: Contrary to section 212(1) of the Crimes Decree 44 of 2009.

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, unlawfully and indecently assaulted A.A by caressing her breasts.

Second Count

Rape: *Contrary to section 207(1) and (2) of the Crimes Decree 44 of 2009.*

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, inserted his penis into the vagina of A.A without her consent.

Third Count

Sexual Assault: *Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, unlawfully and indecently assaulted A.A by rubbing his penis on her vagina.

Fourth Count

Rape: *Contrary to Section 207(1) and (2) (b) of the Crimes Decree 44 of 2009.*

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, inserted his fingers into the vagina A.A without her consent”

- [3] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

‘6. The prosecution alleges that the accused has committed these four offences on the victim between 1st day of April 2012 and 1st day of May 2013. In respect of the first count, the prosecution alleges that the accused touched the breast of the victim while she was revising her notes in her bed room. In respect of the second and third count, it has been alleged that that accused came behind the victim while she was cleaning the bed room of her aunty and pushed her on to the bed. He then unbuttoned her top and lifted her skirt. The

accused then indecently rubbed his penis on her vagina. He then inserted his penis into the vagina of the victim without her consent. In respect of the fourth count, the prosecution alleges that the accused came to the victim while she was sleeping in her room in the night and inserted his finger into her vagina.

7. *The accused in his evidence denies these all allegations and states that he never done such things to the victim.*

- [4] At the end of the summing-up on 23 August 2016 the assessors had unanimously opined that the appellant was guilty of all four counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 24 August 2016, convicted the appellant on all counts and sentenced him on 25 August 2016 to 03 years of imprisonment on the first count, 15 years of imprisonment on the second count, 06 years of imprisonment on the third count and 13 years of imprisonment on the fourth count (all sentences to run concurrently) with a non-parole period of 14 years.
- [5] The appellant had signed a timely notice of appeal/application for leave to appeal on 12 September 2016 (reached the CA registry on 21 February 2017 from Lautoka Correction Centre) against conviction. He had signed another appeal against conviction and sentence on 19 September 2016 which had reached the CA registry on 03 March 2019. The Legal Aid Commission had filed an amended notice of application for leave to appeal against conviction and sentence and written submissions on 15 October 2020. The state had tendered its written submissions on 26 November 2020.
- [6] 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. The test for leave to appeal is ‘**reasonable prospect of success**’ (see Caucau 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] FJCA87 and Waqasaqa 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.

- [7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae's** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

- [8] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

Ground 1

The Learned Trial Judge may have erred in law and in fact when providing an inadequate direction on the issue of prior inconsistent statement which was fundamental to the credibility and reliability of the witness.

Ground 2

The Learned Trial Judge may have erred in law and fact in not cautioning the Assessors that the medical report was inconclusive.

Ground 3

The Learned Trial Judge may have erred in law and in fact to convict the Appellant when the conviction was unreasonable and cannot be supported by the evidence when there was a belatedness in reporting the matter thus gravely and fundamentally tainted the complaint as a credible and reliable witness.

Ground 4

That Learned Trial Judge may have erred in law and in fact to convict the Appellant when the conviction was unreasonable thereby causing a grave miscarriage of justice to find that complainant's evidence and explanation given for the inconsistent nature of the evidence and the statement made to the police did not adversely affect the credibility of the evidence given by the victim.

Sentence

Ground 1

That the Learned Trial Judge may have erred in fact and law to allow extraneous or irrelevant matters to guide or affect him when choosing the starting point.

Ground 2

That the Learned Trial Judge may have erred in fact and law by failing to take into account some relevant considerations to decrease the sentence.

01st and 04th grounds of appeal

- [9] The appellant criticizes the trial judge's directions on three inconsistencies which are in fact omissions and his decision to convict the appellant in the light of those omissions. They are to be found at paragraph 69 of the summing-up.

[69] The learned counsel for the defence cross examined the victim and Amrita about the inconsistent nature of their respective statements made to the police and their evidence given in court. Three of the incidents that the victim alleged in her evidence has not been recorded in her statement. They are the kissing of her lips by the accused, the touching of her breast by the accused while she was revising her notes in her bed room and the incident that he came on top of her and forced her to have sex while she was sleeping on the floor at the lounge. The victim in her evidence stated that she told the police everything, but they have not recorded them in the statement. Amrita has stated in her statement made to the police that the incident of accused coming on top of the victim was taken place sometimes in April last year. She made her police statement on the 15th of July 2013. Amrita in her evidence stated that she was confused with the time, but that incident actually took place.

- [10] It appears that there is no charge based on the appellant having kissed the complainant's lips. Touching of breasts and forcing her to have sex while she was sleeping on the floor are the basis of 01st and 04th counts. The complainant's evidence

had been challenged on the basis that she had failed to mention those acts in her police statement. However, the defense had not been able to demonstrate any such omission, inconsistency or contradiction with regard to her evidence on the second count of sexual assault and the third count of rape. The explanations given by the complainant and witness Amrita for the said omissions have been placed by the judge at paragraph 69 of the summing-up before the assessors. The appellant argues that the trial judge's directions on those omissions are inadequate and cites **Ram v State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012) in support of his contention.

- [11] It is a paramount duty of the trial judge to direct and guide the assessors on how to act on the inconsistencies or contradictions or omissions (*vide* **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017)). The trial judge had fulfilled this obligation at paragraphs 70 and 72 of the summing-up.

[70] I now explain you the purpose of considering the previously made statement of a witness with his or her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the witness is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. The evidence is what the witness testified in court on oath.

[72] If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

- [12] I do not think that **Ram** lays down any incantation to be read in every case word to word. The trial judge had captured at paragraph 70 and 72 the essence in **Ram** in his directions to the assessors on the said omissions.
- [13] The applicable test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows.

‘[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see R. v O’Neill [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 witnesses cannot be annexed with undue importance (see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280)’

- [14] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

‘[35].....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; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (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;’’

- [15] The Court of Appeal followed the above decisions in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019).

- [16] I have considered how the trial judge had dealt with these omissions in his summing-up and the judgment respectively. Paragraph 71 of the summing-up is as follows.

‘[71] It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo et cetra. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.’

- [17] The judge had dealt with the same issue at paragraphs 9-12 of the judgment and concluded as follows:

'10 Having observed the victim giving evidence in court and her explanation given for the inconsistent nature of the evidence and the statement made to the police, I do not find it has adversely affected the credibility of the evidence given by the victim.

11. The victim was straight, precise and consistent in giving her evidence. She was not evasive. She answered completely to the questions posed on her. I observed her demeanor when she was cross examined.'

[18] The position of the trial judge at a trial with assessors in Fiji is that the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016). Therefore, what ultimately prevails is the trial judge's decision.

[19] The counsel for the appellant had not sought a redirection on this matter at the end of the summing-up if the directions were thought it to be inadequate. Therefore, the appellate court will not readily accommodate the appellant's complaint as an appeal point at this stage (vide **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)].

[20] In all the circumstances above discussed, I do not think that these two grounds of appeal have a reasonable prospect of success in appeal.

02nd ground of appeal

[21] The appellant argues that the trial judge should have cautioned the assessors that the medical evidence was inconclusive and cites **Bulivakarua v State** [2019] FJCA 190; AAU149 of 2014 (03 October 2019) as being supportive his contention.

[22] The trial judge had referred to medical evidence that the complainant's hymen was not intact and it could be the result of any blunt trauma at paragraph 59 of the summing-up. The evidence of penetration came from the complainant's clear and

unambiguous evidence and specifically set out at paragraph 44 and 46 of the summing-up. As the trial judge had correctly pointed out at paragraph 36 there was no need in law for corroboration of the complainant's evidence either by way of medical evidence or other evidence.

[23] In ***Bulivakarua*** the inadequacy of the victim's evidence on penetration was sought to be remedied through medical evidence by the trial judge and the remarks that the trial judge should have given more specific directions on the inconclusiveness of the medical evidence were made in that context. ***Bulivakarua*** should necessarily be distinguished from the facts of the instant case.

[24] Therefore, there is no reasonable prospect of success of this ground of appeal.

03rd ground of appeal

[25] The appellant's argument is based on the issue of delay in reporting the incident. The trial judge had directed the assessors on this aspect at paragraphs 66 and 67 of the summing-up.

'66. The learned counsel for the defence further proposed you that the lateness of the victim in reporting this matter to her aunty, makes the eventual complaint she made less reliable and credible. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts has shown that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the nearest person they see. Others, who react with shame, fear, shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. A late complaint does not necessarily constitute a false complaint, likewise an immediate complaint does not necessarily constitute a true complaint. It is matter for you to determine whether the lateness of the complaint affects the credibility and reliability of evidence given by the victim. In order to do that, you need to consider what the victim said about her experience and her reaction to it.

67. The victim was fourteen years old at the time of these alleged incidents took place. She stated the accused was providing her needs as she moved to live with them. She respected him and scared of him. The accused also in his evidence stated the victim respected him. The victim in her evidence explained the reasons for not reporting the matter to her aunty or any other relatives. Moreover, she explained the reasons for not reporting this to her teachers at the school. Her mother has passed away and her step- mother has ill-treated

her. She only had her aunty and the accused to look after and support her at that time.'

[26] The trial judge had dealt with the same issue at paragraph 8 of the judgment.

8. *The learned counsel for the defence submitted in her closing address that the lateness of the victim in reporting this matter to her aunty, makes the eventual complaint she made less reliable and credible. The victim in her evidence explained the reasons why she did not inform her aunty, father, teacher or any other elderly person about these allegations. She was fourteen years old at that time. Her mother has passed away and her father is now married to another person. Her step mother has ill-treated her, forcing her to live with the family of the accused. Having considered the reasons given by the victim for not reporting the matter promptly and her personal circumstances, I find the lateness in complaining this matter to her aunty has not adversely affected the credibility and reliability of the evidence given by the victim.*

[27] The trial judge's directions to the assessors and his own analysis on late reporting is substantially in conformity with the "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

*'[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 **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.'

[28] In the case of **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622 it was said:

'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.'

- [29] Therefore, there is no reasonable prospect of success of this ground of appeal.
- [30] In my view, having considered the evidence against the appellant as a whole, it cannot be said that the verdict was unreasonable. There was clearly evidence on which the verdict could be based. There was undoubtedly evidence before the High Court that, if accepted, would support the verdict of guilty. Neither could it be said that after reviewing the various discrepancies between the evidence of the prosecution witnesses that there had been a miscarriage of justice [vide Sahib v State [1992] FJCA 24; AAU0018u.87s (27 November 1992), Rayawa v State [2020] FJCA 211; AAU0021.2018 (3 November 2020) and Turagaloaloe v State [2020] FJCA 212; AAU0027.2018 (3 November 2020)].
- [31] Similarly, the trial judge also could have reasonably convicted the appellant on the admissible evidence before him (vide Kaiyum v State [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and Singh v State [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)).

01st and 02nd grounds of appeal (Sentence)

- [32] The appellant complains that the trial judge had taken extraneous matters and failed to take relevant matters into account in the matter of sentence.
- [33] The extraneous matters complained of are what the trial judge had stated at paragraphs 12, 13 and 15 of the sentencing order where he had picked the starting point at 13 years. The relevant matter not allegedly considered is the discount or inadequate discount for the appellant being a first offender throughout his life span of 40 years of age.
- [34] The applicable tariff for juvenile rape is 10-16 years of imprisonment [vide Raj v State (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and Raj v State (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment after Aicheson v State (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018).

- [35] The Supreme Court advanced the proposition in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) stating that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. The Supreme Court also said that the lower [end] of the tariff for the rape of children and juveniles is long and the many things which make these crimes so serious have already been built into the tariff and therefore judges should not treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. If they do, that would be another example of ‘double-counting’, which must, of course, be avoided.”
- [36] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.
- [37] It appears that the trial judge had considered the objective circumstances of the offending in picking the starting point at 13 years and added 03 years for subjective circumstances of the offender as set out at paragraph 17 of the sentencing order as prescribed in two-tiered sentencing approach [see **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015)].
- [38] Except the consideration that the appellant had denied the complainant her childhood and natural growth as one of the aggravating factors to enhance the sentence, I do not think that the trial judge had possibly double counted any other factors.
- [39] The fact that the appellant had committed the offences over a period of time would disentitle him to be treated as a first offender. He had committed acts of sexual abuse of the complainant on more than one occasion. He had been a repeated offender as far


as the complainant was concerned. Therefore, the discount of 01 year granted for mitigation cannot be unduly criticised.

- [40] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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).
- [41] The ultimate sentence of 15 years imprisonment is within the tariff applicable to juvenile rape. As said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) quantum can rarely be a ground for the intervention by an appellate court.
- [42] Thus, there is no reasonable prospect of success of these grounds of appeal against sentence.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL