

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

CRIMINAL APPEAL NO. AAU 110 of 2020
[In the High Court at Suva Case No. HAC 205 of 2017]

BETWEEN : **MALAKAI VULI**

AND : **THE STATE**

Appellant

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. K. Semisi for the Respondent**

Date of Hearing : **06 July 2023**

Date of Ruling : **07 July 2023**

RULING

- [1] The appellant stood convicted at Suva High Court for two counts of sexual assault contrary to section 210(1) (a) of the Crimes Act and four counts of rape upon his 16 year old step-daughter, contrary to section 207(1) and (2)(a) of the Crimes Act. The charges are as follows:

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI *on the 19th day of May 2017 at Suva in the Central Division had carnal knowledge of TTM without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 19th day of May 2017 at Suva in the Central Division unlawfully and indecently assaulted ***TTM*** by sucking her breast.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 9th day of June 2017 at Suva in the Central Division had carnal knowledge of ***TTM*** without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 9th day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted ***TTM*** by sucking her breast.

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 18th day of June 2017 at Suva in the Central Division had carnal knowledge of ***TTM*** without her consent.

SIXTH COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 18th day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted TTM by touching her vagina.

SEVENTH COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 23rd day of June 2017 at Suva in the Central Division had carnal knowledge of TTM without her consent.

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

MALAKAI VULI on the 23rd day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted TTM by sucking her breast.'

- [2] The appellant was acquitted by court of the 06th count at the close of the prosecution case. The assessors had expressed a unanimous opinion that the appellant was guilty of the rest of the counts. The learned High Court judge had, however, found the appellant not guilty of the 08th count and agreed with the assessors on 1st, 2nd, 3rd, 4th, 5th and 7th counts and convicted the appellant accordingly and sentenced him on 12 November 2019 to a period of 15 years' imprisonment each for rape counts and 06 years' imprisonment each for sexual assault counts; all sentences to run concurrently with a non-parole period of 12 years. After the remand period was discounted, the effective sentences were 13 years' and 04 months' imprisonment with a non-parole period of 10 years and 04 months.
- [3] The appellant had lodged in person an untimely appeal against conviction on 02 September 2020.

- [4] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide Rasaku v State CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and Kumar v State; Sinu v State CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).
- [5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide Naisua v State [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No.AAU0015 and Chirk King Yam v The State Criminal Appeal No.AAU0095 of 2011)].
- [6] The delay is over 08 ½ months which is substantial. The appellant's reasons for the delay are that he did not have the relevant documents with him, was uneducated and had no knowledge of law, unaware of appeal rights and did not receive legal advice from counsel. None of these excuses could satisfactorily explain the delay as long as 8 ½ months. Many an appellant in the same position do file timely appeals or at least within 03 months of sentencing. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide Nasila v State [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.
- [7] The victim, her aunt (PW2), a neighbor (PW3) and a medical officer (PW4) gave evidence for the prosecution while the appellant had opted to remain silent but was defended by counsel. The appellant's position revealed in cross-examination of the complainant was that he had consensual sexual intercourse with the complainant. The complainant denied that she had consented to have sexual intercourse with the

accused. Her position was that the appellant had sexual intercourse with her without her consent, or that the he forced her to have sexual intercourse with him.

[8] The sentencing order summarises the facts as follows:

- [6] The prosecution, in support of their case, called the complainant (TTM), her mother, Elina Senirewa, witness Lona Heilana and Medical Officer, Dr. Shelvin Kapoor. The prosecution also tendered the Birth Certificate and the Medical Examination Report of complainant TTM as Prosecution Exhibits PE1 & PE2.*
- [7] At the time of the offending you were legally married to the complainant's mother. Thus, you were the complainant's step-father. The complainant's date of birth is 12 April 2001. Therefore, at the time you committed these offences, the complainant would have been 16 years old, and as such a juvenile.*
- [8] The complainant clearly testified to all the acts you perpetrated on her. She testified as to how you had raped her by forcibly inserting your penis into her vagina on four occasions; namely on 19 May 2017, 9 June 2017, 18 June 2017, and 23 June 2017. The complainant also testified as to how you had sexually assaulted her by unlawfully and indecently sucking her breast on 19 May 2017 and 9 June 2017.'*

[9] The grounds of appeal against conviction are as follows:

Ground 1

THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself that there were serious doubts in the prosecution's case and the doubt ought to be given to the appellant.

Ground 2

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself adequately on the significance of the conflicting evidence of the complainant during the trial.

Ground 3

THAT the Learned Trial Judge failed to direct himself or misdirected himself on the medical evidence produced by the prosecution in convicting the appellant.

Ground 4

THAT the Learned Trial Judge failed to direct or misdirected himself on the manner of the commission of the offence by the appellant which was near impossible having regard to all the circumstances of the case.

Ground 5

THAT the Learned Trial Judge erred in law and in fact in his summing up on the evidence which was adduced by the prosecution and the defence during the trial.

Ground 6

THAT the Learned Trial Judge erred in law and in fact in directing the assessors regarding the inconsistencies in the complainant's evidence.

Ground 7

THAT the Learned Trial Judge erred in law and in fact in not directing himself or misdirecting himself and the assessors regarding the identification of the appellant in the accused dock.

Ground 8

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors on the Turnbull Guidelines on the identification evidence.

Ground 1 and 6

- [10] The appellant must be referring to the evidence of PW3 Lorna Heilana whose police statement was marked as an exhibit at the trial. In court PW3 had said that she saw the appellant pulling the complainant's top up but had said in her police statement that the complainant started to take her clothes off. Again the witness had said under oath that she saw the appellant pulling the complainant's panty off whereas she had told the police that she saw the complainant taking her panty off. The trial judge had pointed out this along with her explanation to the assessors at paragraphs 89(vi) (1) and (2) of the summing-up and directed them how they should evaluate the same at paragraph 100 and 101. The judge had addressed himself on these inconsistencies and her explanation at paragraph 24 of the judgment.

[11] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses [vide Nadim v State [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[12] It appears that despite the said inconsistencies or contradictions the assessors and the trial judge had not disbelieved PW3. Even if PW3's testimony was to be completely rejected (for argument sake), as long as the assessors and the trial judge believed the complainant's unblemished evidence (which clearly appears to be the case here) the conviction against the appellant was possible. Irrespective of PW3's evidence, the complainant's evidence alone is sufficient to prove the charges which he stands convicted of, as no corroboration of her evidence is required to bring home the conviction. Justice Gates in the Supreme Court in K.N.P. v The State Criminal Petition No: CAV 0017 of 2020 (29 June 2023) said of corroboration and section 129 of the Criminal Procedure Act, 2009 as follows:

'[31]There is no longer a requirement for corroboration in cases of this nature.

[33] This means that in such trials held subsequent to the coming into effect of the CPA 2009 judicial officers will not be required to warn assessors of the danger of convicting without corroborative evidence. This applies to those trials held subsequent to the commencement date of the CPA including those with allegations of a sexual nature relating to offences committed before the commencement date. The Law now accepts that there is no inferiority of a witness by reason of the witness being a child, a woman, or the victim of a sexual offence. This ground fails.'

Ground 2

[13] There are no 'significant' conflicting evidence of the complainant pointed out by the appellant. Nor has the trial judge highlighted such conflicting evidence in the summing-up or the judgment. It appears that even in the teeth of heavy cross-examination, the complainant had stood unmoved and unwavering in her narrative

that she did not consent to the acts of sexual misdemeanours upon her by the appellant.

Ground 3

- [14] The learned trial judge had explained in detail the medical evidence to the assessors at paragraph 90-93 of the summing-up which has shown that the complainant's hymen was broken at 9.00 o'clock and 2.00 o'clock positions and a small cut (0.5 cm superficial laceration) was seen on the vaginal skin. Dr. Shelvin Kapoor had confirmed that there had been evidence of vaginal penetration. There is no misdirection by the trial judge on medical evidence.

Ground 4

- [15] The appellant's argument that the manner in which the sexual offences were allegedly committed was near impossible cannot hold water in the light of his position that the sexual acts were all consensual. The commission of the acts was not the contentious issue but whether the acts were consensual or not.

Ground 5

- [16] The appellant did not give evidence; nor did he call any other witnesses on his behalf. Thus, there was defence evidence for the trial judge to comment upon in the summing-up or the judgment. The trial judge had at length addressed the assessors on the prosecution evidence and the appellant's stand that the alleged sexual acts were consensual thus putting the issue of consent as the crucial issue to be resolved. The High Court judge performed the same exercise in an abridged manner in the judgment as well. Therefore, there is no merit in the complaint that the trial judge had erred in the summing-up regarding the evidence before court.

Ground 7

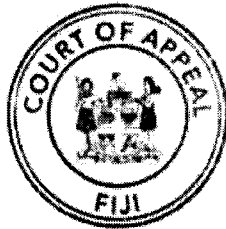
- [17] The identification of the appellant was never in issue at the trial. The appellant and the complainant with her mother were living in the same house at all times material to the alleged incidents. The real issue was whether the acts were consensual or not as the appellant did not challenge the acts *per se* at the trial though no formal admission to that effect had been recorded. Her mother was legally married to the appellant who was therefore her step-father. Thus, no appeal point could be legitimately raised on dock identification.

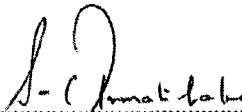
Ground 8

- [18] Since the appellant's identification was not a trial issue, there was no requirement at all for the trial judge to give Turnbull guidelines on identification.
- [19] On the other hand it does not appear that the appellant's trial counsel had sought any redirections on the alleged omissions in the summing-up. Therefore, technically the appellant is not entitled even to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].
- [20] Therefore, none of the grounds of appeal has a real prospect of success in appeal.
- [21] On the other hand, it appears that on the totality of evidence available to them it was reasonably open to the assessors to be satisfied of appellant's guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and trial judge could have reasonably convicted the appellant on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. Thus, the verdict cannot be said to be unreasonable or one cannot say that the verdict cannot be supported having regard to the evidence either.

Order of the Court:

1. Enlargement of time to appeal against conviction is refused.




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

Solicitors:

Appellant in person

Office for the Director of Public Prosecutions for the Respondent