

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

CRIMINAL APPEAL NO. AAU 49 of 2022
[In the High Court at Suva Case No. HAC 184 of 2019]

BETWEEN : **VISHESH RAJ**

AND : **THE STATE**

Appellant

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. J. Prasad for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **24 October 2023**

Date of Ruling : **25 October 2023**

RULING

- [1] The appellant had been charged and found guilty by a Judge alone with four counts of abduction, one count of rape and three counts of defilement.
- [2] After the appellant was convicted, the trial judge sentenced him on 17 June 2022 for the offence of rape (count 2) to a term of 16 years imprisonment, for the offence of defilement (counts 4, 6, 8) to an aggregate term of 8 years imprisonment, for the offence of abduction (counts 1, 3, 5, 7) to an aggregate term of 4 years imprisonment; all terms were made concurrent. The total effective sentence was 16 years imprisonment with a non-parole period of 12 years.
- [3] The appellant's solicitors had lodged a timely appeal only against conviction.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against 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; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaga v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see: **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The trial judge had summarized the facts in the sentencing order as follows:

[3] In 2018, the offender graduated with teaching qualification from the Fiji National University. His first posting as a teacher was at a primary school in Suva. He was assigned to teach Year 5. The victim was one of his students.

[4] In 2019, the victim progressed to Year 6 while the offender became Year 3 teacher. The offender maintained a close connection with the victim and convinced her to accompany him to visit places in his vehicle. They planned to skip school by faking sickness and meet at a car park of a supermarket that was along the way to their school.

[5] On the first occasion, 28 February 2019, the victim accompanied the offender to a hotel in Pacific Harbour. The victim was 12 years old then. He took her into a room and had sexual intercourse with her. She said that she experienced pain during sexual intercourse. He did not use any protection but ejaculated outside. The offender convinced the victim to keep their relationship discreet. The victim kept quiet and her parents and her teachers had no knowledge of the offender’s sexual relationship with his student.

[6] Between March and May 2019, the offender took the victim to hotels along Nasinu and Nausori corridors on three other occasions, and had sexual intercourse with her, without the knowledge of her parents. By this time the victim had turned 13 years old. Since she had consensual sexual intercourse, the offender was convicted of abduction and defilement, as consent of the victim is not a defence to these offences. The last incident occurred on a weekend and the offender was exposed when the victim

secretly disappeared from her home for a few hours and was later caught by her parents.

[6] The appellant's grounds of appeal are as follows:

Conviction:

Ground 1:

THAT the Learned Trial Judge erred in law and in fact when the conviction against the appellant, taken as a whole, was unsafe and untenable given that the evidence adduced did not prove beyond reasonable doubt the guilt of the appellant in respect of all 8 counts.

Ground 2:

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant on the charges of all 8 counts when there were many contradictions and discrepancies in the testimony of the complainant and the evidence of the complainant was not credible against the appellant.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact when is failed to appropriately observe the demeanour of the complainant who testified against the appellant in that she was very evasive in her answer and was inconsistent throughout trial.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact when he failed to believe the testimony of the appellant who was very forthright in his answer compared to that of the complainant.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact in not finding the accused evidence credible but did not give reasons for his findings.

Additional Grounds

Ground 6:

THAT the Learned Trial Judge erred in law and in facts by accepting the reasons for delay of the complaint as reasonable when the evidence before the court suggest otherwise.

Ground 7:

THAT the Learned Trial Judge erred in law when he failed to take into account the totality of evidence as a whole to determine where the truth lies.

Ground 8:

THAT the Learned Trial Judge erred in law and facts in evidence when no medical report was presented in the trial.

Ground 9:

THAT the Learned Trial Judge has erred in law and facts that there are no circumstantial evidence.

Ground 10:

THAT the Learned Trial Judge erred in law and fact when he did not consider basis of inconsistencies and improbabilities of the complainant's evidence.

Ground 11:

THAT the Learned Trial Judge erred in law in directing himself regarding the contradiction of prosecution evidence and what weight to place on it.

Ground 12:

THAT the Learned Trial Judge erred in law and facts when he failed to properly direct himself on effect of the contradictions in the prosecution witnesses' testimony and what weight to be given to it?

Ground 13:

THAT the Learned Trial Judge erred in law when he without any valid reason disbelieved the defendant.

Ground 14:

THAT the Learned Trial Judge erred in law to the significance of prosecution witnesses' conflicting evidence during the trial especially;

- i) When the complainant told the court that her mother was at the roundabout near her house waiting for her whereas her mother in court said she was in the police station at that time.*
- ii) When complainant told the court that her father got off the bus before Shop & Save bus stop in Nabua whereas her mother in court said that the father got off at the Shop & Save bus stop in Nabua.*

Ground 15:

THAT the conviction was unsafe and unsatisfactory having regard to the entire sum of the evidence at trial, in particular to the following;

- i) When asked about dates in the police statement the complainant said it was given to the police by the appellant whereas her sign is in the statement.*
- ii) The complainant told during trial she lied to her class teacher as to why she was not at school.*
- iii) Complainant told she was alone when police took her report then in cross-examination she states that her mother was with her and giving report to police in her report.*
- iv) Complainant told court that every time same things happened in the hotel rooms which is the complainant was on top of the appellant. But in the end the sperm drops on her stomach while she is on top. Can that happen?*

Ground 1, 7 and 15

- [7] In the first place, the basis of challenge to a verdict of guilty in Fiji is not whether it is unsafe or unsatisfactory (or untenable) (see: **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) & **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. It is, in terms of section 23(1) of the Court of Appeal Act, whether the (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the Appellant if the Court considers that no substantial miscarriage of justice has occurred.
- [8] The test to determine a ‘*verdict which is unreasonable or which cannot be supported by evidence*’ as laid down by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) namely whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, could be adopted *mutatis mutandis* to a verdict delivered by a judge alone because in any event in Fiji the assessors were not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors were 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. Thus, whether the trial judge also could have reasonably convicted the appellant on the evidence before him is also equally applicable as a test when a verdict delivered by a judge alone is challenged on the basis that it is unreasonable (see: **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)).

- [9] Paragraphs 13-24 of the judgment shows that how the complainant's evidence had established all elements of the counts 1-8. Mother's evidence corroborated the complainant at least with regard to the last incident in May 2019. After she came home on that day the complainant had confided to the mother that earlier too the appellant had taken her to hotels and sleeping with her and wanted to change her school. The mother had not given permission for him to take her anywhere.
- [10] According to PW3, Ms. Fong and PW4, Mr. Kapoor the complainant and the appellant had been absent from school on same days in 2019. Both had given the reason for absence as sickness. This circumstantial evidence clearly buttress the complainant's evidence.
- [11] The trial judge had considered the inconsistencies in the complainant's evidence and felt that they were on peripheral matters as she was giving evidence after 03 years. Similarly, the matters highlighted by the appellant in the 15th ground of appeal do not make the conviction unreasonable. They do not go to the root of the complainant's evidence in the totality of the circumstances of the case.
- [12] The appellant had totally denied the allegations under oath. However, his counsel had suggested to the complainant that it was her who told the appellant to meet her at Shop & Save at Nabua, the meeting point for them on all occasions. The line of cross-examination, particularly the above suggestion has betrayed the appellant's denial under oath. The trial judge had not believed his denial. Nor had his evidence created a reasonable doubt in the prosecution case. Neither, had the trial judge deemed that at least his version may be true.

- [13] Therefore, I think it was quite open to the trial judge to have been satisfied with the appellant's guilt beyond reasonable doubt.

Ground 2, 10, 11, 12 and 14

- [14] In his analysis of the complainant's evidence, the trial judge had considered certain inconsistencies in her evidence at paragraph 45 and 46 of the judgment and stated that she was inconsistent on certain peripheral matters such as her clothing and travelling routes when compared with her police statement, but that was to be expected from a child witness giving evidence of events that allegedly took place three years ago. Further the trial judge had said that she was mistaken that the appellant taught her in Year 3 and accepted the appellant's evidence that his first contact with the complainant was in 2018 when he taught her in Term 3 of Year 5 and in 2019 he was the class teacher for Year 3.
- [15] In other words the trial judge had concluded that the inconsistencies in PW'1 evidence was not capable of shaking the very foundation of prosecution case [vide: **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]
- [16] The same goes for the complainant's evidence that the mother was at the roundabout waiting for her whereas the mother's evidence was that she was in the police station at that time. Similarly, PW1's evidence that her father got off before Shop & Save bus stop at Nabua whereas the mother's evidence was that he got off at the Shop & Save bus stop at Nabua. These are not material discrepancies at all and cannot adversely affect the core narrative of the complainant's evidence.

Ground 3

- [17] Country to the appellant's submission, the trial judge had concluded at paragraph 48 that the complainant was consistent regarding her account that she accompanied the appellant on four separate occasions in 2019 when she was in Year 6, without the knowledge of her parents, and had sexual intercourse with him and said at paragraph 55 that he found the complainant's account to be consistent and credible. The

complainant had struck the trial judge as a truthful witness and he found that the prosecution had established beyond reasonable doubt that the appellant took the complainant from the possession of her parents and did have sexual intercourse with her on four occasions as alleged in the charges.

- [18] The trial judge had given cogent reasons for his decision at paragraphs 51-53 and said at paragraph 55 that he did not accept the appellant's account that he was with his family on the four alleged occasions as true.

Grounds 4, 5 and 13

- [19] The trial judge had summarised the appellant's evidence at paragraph 33-38 and stated at paragraph 39 that in cross-examination the appellant had admitted that his evidence was different from his police statement because his police statement was obtained by police using force and threats. The trial judge had cautioned himself on same lines applicable to a 'word against word' situation [see: **Anderson** [2001] NSWCCA 488; (2001) 127 A Crim R 116 & **Naidu v State** [2022] FJCA 166; AAU0158.2016 (24 November 2022)] at paragraph 41 and reminded himself at paragraph 42 that the prosecution case substantially dependent on the complainant's evidence. From paragraph 51-55 of the judgment contains cogent reasons as to why the trial judge had not accepted the appellant's account that he was with his family on the four alleged occasions.

- [20] In the light of the trial judge's analysis, I have no reason to doubt the correctness of the above conclusion. It has been stated many times that the trial court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere. There was undoubtedly evidence before the Court that, when accepted, supported such verdict [see: **Sahib v State** (supra)].

Grounds 6

[21] I have addressed the often taken up point in appeal based on ‘delay’ in the recent Ruling in **Leveni Waqa v The State** AAU 77 of 2021 (23 October 2023) and would not repeat the same discussion here.

[22] Australian Law Reform Commission¹ states that:

‘27.296 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the ‘predictors associated with delayed disclosure’ reveal differences in reporting patterns depending upon the victim’s relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, ‘it is likely that evidence about a complainant’s first complaint would answer the type of questions that jurors can be expected to ask themselves’.

[23] The pertinent pronouncements on how to evaluate delay are found in **Leveni Waqa v The State** (supra) and **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where the court of appeal adopted the ‘totality of circumstances’ test to assess a complaint of belated reporting.

‘[24] 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.’

[24] Given the consensual relationship of teacher and pupil between the appellant and the complainant, I have little difficulty in understanding the reason for the belated complaint (which passes the threshold of ‘totality of circumstances’ test), that too after

¹ <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/27-evidence-in-sexual-assault-proceedings-3/evidence-of-recent-and-delayed-complaint/>

the complainant was ‘caught’ by her brother and mother on the last occasion forcing her to divulge all previous incidents her (see paragraph 50 and 54).

Grounds 8

- [25] There was no obligation on the part of the prosecution to produce a medical report to prove its case. The trial judge made no error in accepting the version of the prosecution beyond reasonable doubt without any medical evidence.

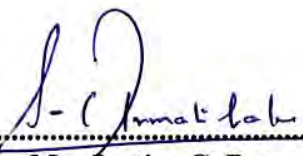
Grounds 9

- [26] Contrary to the appellant’s assertion, there was indeed circumstantial evidence in the form of the complainant’s mother, class teacher and school principal to buttress the complainant’s evidence.

Order of the Court:

1. Leave to appeal against conviction is refused.




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