IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 57 OF 2018
Lautoka High Court No. HAC 220 OF 2013

BETWEEN	:	**VILIAME WAQANINAVATU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, JA**
		Qetaki, JA
		Bull, JA
Counsel	:	**Appellant in Person**
		Dr A. Jack (Office of the DPP) for the Respondent
Date of Hearing	:	**05 May, 2023**
Date of Judgement	:	**25 May, 2023**

JUDGEMENT

Mataitoga JA

In the High Court

[1] The appellant was charged with the following offences in the High Court at Lautoka on 20 January 2014.

First Count

RAPE: Contrary to section 207 (1)(2) of the Crimes Decree No: 44 of 2009

Statement of Offence

VILIAME WAQANINAVATU on 27 day of October 2012 at Nadi in the Western Division, had carnal knowledge with **LILI NAITUKANA SOROVI** without her consent

Second Count

ATTEMPTING TO PERVERT THE CAUSE OF JUSTICE: Contrary to section 190(e)) of the Crimes Decree No: 44 of 2009

Statement of Offence

VILIAME WAQNINAVATU ON 27 October 2012 at Nadi in the Western Division, attempted to pervert the cause of justice, by forcing LILI NAITUKANA SOROVI, to withdraw her complaint of rape against him.

[2] The learned trial judge had summarized the facts as follows:

> *'14.] The thrust of the prosecution evidence came from Lili the lady who reported this crime of rape. She told us that in the early hours of the 27th October 2012 was drinking grog at her sister's house with her two roommates. When she was there a friend Sai called her and asked her to go to NASA Club. She and the two friends went to NASA and joined Sai for about 2.5 hours. After that the 4 of them went to "After Dark" night club.*
>
> *15.] When that club closed, she was outside with Vili and he asked her to go with him to his dorm to get some money. She had never met Vili before but had met him*

in the "After Dark". She said that Sai knows Vili and he had called him over to meet them. They spent an hour together in the club. She went with Vili in a taxi to his dorm. He asked her to go inside the room and asked her to hug him. She said no, just get the money and we will go. He kept hugging her and trying to have sex with her. He lay on top of her wearing ¾ shorts and no top. He overcame her and pulled her panties and he had sexual intercourse with her. She didn't like what he did. She was crying and didn't want him to put his penis in her vagina. When he had finished, he left her and went to his home which was not in the dorm. When she came out of the room, she saw a policeman and she ran to him. His name was Pita and she told him what had happened. He took her to the Police Station because he didn't want to talk in a public place and he wanted to find out what had happened. She was taken to another officer and told him that it was Vili who had done it. It was at the station that she learned that Vili was a Police Officer and that he lived in quarters and not the dorm. She made a statement to the Police and then went to the hospital.

16.] After that Vili asked Patrick, another Police Officer, to call her and get her to go to Vili's house and talk about the incident. Patrick came with Vili's wife and their small child to her dorm to ask her to withdraw the case. Patrick came twice and on a third occasion he picked her up from the grog shop and took her to Vili's place to talk. Her roommate Unaisi went with her. They got to his house in the early evening between 7pm and 8pm, they sat on a mat outside. There was Vili, his wife, Patrick, the witness Lili, and Unaisi. They told her to withdraw the complaint and they would give her money. Vili's wife said that when he got his job back, they would pay her. Vili was talking to Patrick and he talked to her but she didn't speak to him. She told the group that she didn't want to withdraw the case.

17.] Two days after that Patrick went to her sister's house to try to get her to persuade Lili to withdraw. The sister called and asked Lili to go and meet her to discuss it. Lili went and her sister told her that Patrick had been to see her three times. She told her sister she wasn't going to withdraw.

18.] Lili identified the accused in Court as the Vili she had been talking about all through her evidence.

19.] In cross-examination Lili agreed that she never mentioned the name Vili in her statement to the Police, but she said that she didn't know his name at the time she made the Statement. She also admitted that she told the Police he was wearing a condom, something that she did not say in her evidence.

20.] She admitted that there was no formal identification parade at the station, but she saw him there and identified him as her rapist.

21.] The second prosecution witness was a senior officer Petero. At 5am on the 27th Octo012 he 2 he was stationed outside the "After Dark" nightclub. He saw the accused (hetified him him in Court) following a tall slim iTaukei girl out of the club.

He happened to see her in the Namaka Police station later that day. He paid special attention to the accused because he knew him as a police officer.

22.] The third and last witness for the prosecution was Pita Keni, another senior police officer in the Nadi District. On the 27th October 2012 he was going for his morning walk and on the way, he conducted his usual check on the Namaka compound and quarters. On his way home, he met Lili who was with another officer, PC Ledua. She told Pita that she had been raped at the Bachelors quarters. Ten minutes later she came to Pita's residence, frustrated. She told Pita that she had been raped and told him where the room was. Pita went to the room and said that there was nobody there. He did not say empty as Mr. Maopa told you yesterday. Pita took Lili to Namaka Police Station to a complain and he handed her over to Corporal Joshua to take a statement.

[3] At the conclusion of the trial on 21 February 2018, the assessors' opinion was unanimous that the appellant was guilty on both counts as charged. The learned trial judge agreed with the assessor's opinion. In his judgment delivered on the same day, he trial judge convicted the appellant and sentenced him to 8 years with a minimum serving period of 7 years on the charge of rape and 18 months of imprisonment on the charge of attempt to pervert the course of justice; both to run concurrently.

Court of Appeal

Before Judge alone

[4] In the intervening period, the applicant has been active in seeking to get bail pending the hearing of his appeal to the Court of Appeal and in submitting amended grounds of appeal. The appellant's submissions on his appeal against conviction and bail pending appeal had been dated 06 December 2019. The state had filed its written submissions on 12 March 2020. The appellant had filed 'cross submissions' on 24 April 2020. The appellant had once again filed another two sets of written submissions on 18 May 2020 and 26 June 2020 (the same as the one signed on 14 July 2020 and reached the CA registry on 21 July 2020). The state's additional submissions have been filed on 29 June 2020.

[5] The hearing of the appellant's Leave Application to appeal against conviction and bail were heard on 17 July 2020 and ruling was made on 27 July 2020.

Bail Application

[6] With regard to the bail application, it was refused. It had no realistic chance of succeeding in the light of the evidence in this case and applicable relevant principles of law set out in **Qurai v State** [2012] FJCA 61; AAU0036/2007, wherein the Court of appeal stated:

> *"It would appear that exceptional circumstances are a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
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> *On the other hand, exceptional circumstances are also relevant when considering each of the matters listed in section 17 (3).'*
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> *[12] In **Balaggan v State** [2012] FJCA 100, the Court of Appeal further said that 'The burden of satisfying the Court that the appeal has a very high likelihood of success rests within section 17(3) (h) of the Bail Act the Appellant."*

[7] In **Ratu Seniloli & Others v State** AAU 41/2004 (24 August 2004), the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in section 17(3) of the Bail Act namely, 'the likely time before appeal hearing' and 'the proportion of the original sentences which will have been served by the applicant when the appeal is heard" are directly relevant, only if the court accepts that there is real likelihood of success, otherwise those matters are otiose.

[8] Applying the above tests to the appellant's application for bail, the Judge alone was concluded that it did not meet the tests set out in section 17(3) of the Bail Act. Appellant's bail application was unlikely to succeed given the facts of this case and was dismissed.

Appellant's Grounds Submitted for Leave to Appeal Hearing

[9] The appellant submitted 22 grounds of appeal against conviction to support his leave application. Each of the grounds of appeal was carefully itemized and summarised in the ruling of the Resident Justice of Appeal. Several of the submitted grounds of appeal covering similar complaints, were consolidated by the court for the purpose of making its evaluation against the evidence adduced at the trial more manageable.

[10] I refer briefly to the assessment of the Court to grounds of appeal and the ruling on each:

(i) Ground 1: The trial judge erred in law when he failed to give the right to the appellant to appeal to the Court of Appeal from the High Court. Section 14(2)(o) of the Constitution 2013.

Section 14(2)(o) of the Constitution simply states the right of an accused person to seek review or appeal. It does not confer an automatic right to appeal or review of a court decision. The appeal or review must be undertaken pursuant to the relevant statutory provision enacted to implement such a right, such as the Court of Appeal Act, Regulations made thereunder and Rules.

This ground is misconceived and frivolous. It is dismissed.

(ii) Ground 2: Unreasonable delay in bringing case to Court

The appellant complains that the 5 years 6 months delay in bring this case to trial is unreasonable and is a miscarriage of justice. It violates his right to a fair trial without delay in section 15(3) of the Constitution. The appellant has not provided any evidence on how the 5 years and 6 months delay is computed and what were the causes of the delay and which party was responsible. The appellant's complaint about unreasonable delay is that it was never raised during the trial stage. Another option open to the appellant was to pursue a constitutional redress on account of unreasonable delay, but none was filed.

The other matter is that appellant did not claim that the delay alleged was so unreasonable that it compromised the fairness of his trial. This would have required the appellant to provide evidence to support such a claim. In light of the above and after consulting **Nalawa v State** [2010] FJSC 2; CAV 0002/2009, the Judge alone found this ground of appeal has no merit and was dismissed.

(iii) Grounds 3, 9, 11, 14, 16 and 19 – Lack of Fairness in Trial Judge"s Summing up

These six grounds of appeal involve complaints against the summing up as regards, the following: where trial judges asked assessors to ignore certain comments made by defence counsel on lack of medical evidence; whether the room in which the alleged offence took

place was in fact empty or not; not calling Patrick in respect of second count to test credibility of the complainant; admission of hearsay evidence by reference to a person called Sai

In dealing with these grounds of appeal the court noted that none of these were raised at the trial state. Just before the trial judge concluded his summing up to the assessors, he invited the counsel representing the parties, if they wished to comment or suggest any addition to what he has stated in the summing. There was no further suggestion from both counsels of the parties.

The court also briefly reviewed each of the grounds urged consolidate them, finding that in each there were no basis for the complaint of the appellant due the fact he could not point to evidence that support his claim of lack of fairness arising from the trial judge's summing up. This ground has not prospect of success on appeal.

(iv) Ground 6 – Directions on Identification evidence

On this ground, the appellant complains that there is lack of direction on the dock-identification, in the summing-up. To support this claim, the appellant refers to evidence of the complainant regarding his dress on the night of the rape; in that he was wearing ¾ length pants, when he was not.

In the case of the appellant at his trial he did not contest the issue of identification. The appellant's case, was on false accusation NOT mistaken identity. This ground was found to have no merit.

(v) Grounds 12 and 15 Procedural Unfairness in amendment of Charging Statements

The appellant's claim that due to the omission of the trial judge in mentioning the relevant section of Crimes Act in his summing up and judgment, the conviction should be quashed. It was stated by the court that section 237 (3) Criminal Procedure Code, which states that notwithstanding section 142(1), when a judge's summing up is on record, it is not necessary for the judgement to restate the requirements set out in section 142(1).

This ground has no merit.

(vi) Grounds 8, 10, 13, and 20 – Failure to address inconsistencies

These grounds of appeal by the appellant, are rehashing some of the ones already dealt with earlier under the cohort of unfairness in Summing-up. For example, the appellant complains that the complainant's statement to the police and her evidence in court are inconsistent and it was not addressed by the trial judge in summing up to the assessors. The court reviewed the court record and found that paragraphs 11, 12, and 19 of the summing-up and paragraph 8 of the judgment adequately cover these complaints.

These grounds have no merit and is dismissed

(v) Grounds 7, 17 and 18

These grounds of appeal question the fairness of the summing up without any evidence to support the complaint. But the court noted that the appellant has not demonstrated with examples by reference to the summing up, how it has not lived up the standard expected, as set out in **Tamaibeka v State** AAAU 0051/1997 (January 1999).

(vi) Ground 23 – Trial Counsel

The appellant had raised this criticism of the trial counsel earlier. The appellant was advised on 28 May 2020, to follow the procedure and provide support evidence set out in **Chand v State** [2019] FJCA 254; AAU0078/2013. This important advice was not followed by the appellant. The court did not consider this ground of appeal because proper procedures were not followed.

[11] After a careful review of the grounds urged by the appellant and with reference to relevant case law, all the appeal grounds were dismissed, because none had high likelihood of success for bail pending appeal application, and reasonable prospect of success for leave to appeal.

Full Court

[12] It should be stated that from the start, the difficulty this court faced was in trying to ascertain with some degree of certainty the number of grounds of appeal being urged by the appellant at various stages of this appeal process. Even on the day of the hearing of the appeal, the appellant was still seeking to submit new grounds of appeal and amendment some of the grounds already submitted and dealt with at the leave to appeal hearing stage.

[13] This will need to be reviewed so that stricter observation of the rules of procedure for filing grounds of appeal enunciated in the following case need to be followed strictly. In **Gonevou v State** [2020] FJCA 21, the Court of Appeal said:

> *'10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.*
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> *[11] Regarding a rehearing by the Court of Appeal, Rule 35(4) of the Court of Appeal Rules states that a notice of appeal shall precisely specify the grounds (including, if any, questions of law) upon which the appeal is brought. The same should obviously apply to notice of applications for leave to appeal as well. When an appeal is lodged from the High Court in its appellate jurisdiction, the notice of appeal shall state precisely the question of law upon which the appeal is brought [vide Rule 36(1) of the Court of Appeal Rules].*

Assessment of the Appeal Grounds:

Follow the Rules of the Court

[14] Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting evidence in a coordinated way. This was clear derogation from the requirement in **Rule 35(4) Court of Appeal Rules** which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, Rule **36(1) of the Court of**

Appeal Rules, requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court

[15] This appeal should have not been listed until the above rules were fully satisfied. I hope for the future, these rules will be better implemented to avoid the situation in this appeal, where the grounds of appeal have been amended so often; even on the day of the hearing further amendment were being sought by the appellant, to be considered.

Approach Adopted for this Appeal Hearing

[16] For this appeal what the court has done, is to cluster the 23 grounds of appeal and other amendments sought under various subheading depending on the issues of law that may be involved. Most of the grounds urged were the same as those dealt with at the hearing of the leave to appeal stage. In addition, the appellant introduced two new grounds of appeal, according to him not before submitted. The two new grounds are:

(i) *Delay in bringing the case for trial and not determining the charge within a reasonable time in breach of section 14(2)(g) and Section 15(3) of the Constitution, causing prejudice to the appellant causing miscarriage of justice*

(ii) *The learned trial judge erred in law and fact in convicting the appellant based on the recent complaint evidence of the complainant alone, making the conviction unsafe and unsatisfactory*

Dealing with section 14(2)(g) & Section 15(3) of the Constitution

[17] The appellant's new appeal ground is predicated on the right of an accused person to be tried without unreasonable delay under the Fiji Constitution. I noted that this cannot be a ground of appeal to this court, as the matter raised was never raised or argued in the course of the trial in the High Court, so that when it comes on appeal to this court, the parties would have had a previous opportunity to address this issue. It was first raised when the appellant made a submission of new grounds of appeal on 26 September 2022.

[18] In terms of the requirement of section 23(1)(a) of the Court of Appeal Act 2019, the primary focus the court is '*having regard to the evidence or the judgement of the court before whom the appellant was convicted.*'' The appellant had the opportunity to seek constitutional redress on this issue but that did not do so. Neither did he seek an adjournment of his trial and ask the court to address this claim separately.

In addition, the complaint of the appellant is a bald one, without references to factors in the delay that would cause prejudice and how the length of the delay may have affected this case preparation. Without supporting evidence to prove the appellant's claim of prejudice in his trial preparation, the court is in no position to assist his claim. This is misconceived at this stage and frivolous. It has no merit.

Recent Complaint

[19] The appellant's submission on recent complaint set out in the second new grounds of appeal, is a slight twist on the similar complain submitted to the Judge at the Leave Application stage. The appellant is now alleging that the error by the trial judge was in convicting him based on the recent complain of the victim alone.

[20] However, in reviewing the evidence in the trial the following is clear. First, the trial judge did highlight the evidence of Pita Keni in paragraph 23 of the summing up. The appellant appears to accept that the recent complaint as regards count 1 was properly admitted but he argues that it was improperly admitted for count 2. He has not provided any evidence to support this and I have not been able to independently find any error in the trial judge's summing on this issue.

[21] The Court of Appeal in **Alfaaz v State** [2018] FJCA 19; AAU0030/2014, had made it clear that this piecemeal approach to claiming misdirection of the trial judge's summing-up will not be tolerated. The Court stated:

> *'42] The Supreme Court and this Court on more than one occasion had commented on constant complaints on alleged non-directions and*

misdirection. Knowing that I am being repetitive it is nevertheless apt once again to quote from Raj v State Petition for Special Leave to Appeal No.CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 where the Supreme Court remarked

'At trial, defence counsel could have raised with the judge the proper direction to the assessors.....the raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge.''

[22] In this case the trial judge invited both counsels if there were changes that may be needed in his summing up before the assessors retired. Both counsels did not make submission on this point. This ground is frivolous and has no merit.

Section 14 (2) (c) Constitution – CID HQ PEP 149/13

[23] In an affidavit [not sworn] but filed in support of the appellant Notice of Appeal on Question of Law Alone dated 27 September 2022, he claims that he was visited by police officers from the Criminal Investigation Department [CID] and they discussed CID HQ PEP 149/13. Arising out of that visit from the Police Officers and the discussion that must have ensued with the appellant, he alleges that not all the information in the police investigation folder at CID HQ was disclosed to him. It must be stated all these claims by the appellant are hearsay and cannot be taken as evidence in this hearing. He claims that section 14(2) of the Constitution as giving him the right to be given the information in the police investigation docket.

[24] As regard, section 14(2) (c) of the Constitution, it is a limited right, it confers a right to an accused person to witness statements only. It does not confer right to all information that the police may have collected in the course of the investigation of the case in question. This submission has no merit.

Inconsistent Statements of the Complainant

[25] Several of the appellant's grounds of appeal were based on his claim that the trial judge's summing up was inadequate as regards, identification of the appellant, inconsistent

statements made by the complainant with regard to his identification, the room in which the offence took place – whether it was it empty and the inconsistent statements of PW2 Petero Tuirarama and PW3 Pita Keni. I now turn to consider the summing up and the evidence referred to by the trial judge as regards each of these issues raised by the appellant.

(i) On identification:

It should be noted that at the trial, defence counsel had not raised this issue, in the way the appellant is now. This distinction is important in the way evidence may have presented by the prosecution. In the summing up, at paragraph 15 the trial judges addressed the issue of identification with the assessors thus:

> *'[15] ... She had never met Vili before but had met him in the After Dark. She said Sai knows Vili and he called him over to meet them. They spent an hour together in the club. She went with Vili in a taxi to his dorm" [emphasis added]*

At the police station when the complaint was being processed, she identified Vili again as the person who raped her. Defence Counsel brought up the fact in the closing statement, that in her previous statement to the police dated 27 October 2012, she stated that the person that rape her was Isimeli not Vili. The trial Judge could not have been asked by the defence counsel, to address this point in the summing because the defence was trying to use a statement that was recorded in the course of police investigation, the content of which is not evidence to undermine the sworn evidence in court of the complainant. The complaint was not cross-examined on her statement in court.

Counsel for the appellant did not avail the opportunity when the trial judge gave them, to propose any amendment to the summing up. This was an unfortunate oversight. The appellant did not give evidence at his trial thus an opportunity to rebut some of the issue now being raised was foregone. Despite the strong claim made by the appellant on this issue summing up, it is all speculation at this stage. In terms of section 23(1) of the Court of Appeal Act 2019, the assessment of this court is that , there was no substantial miscarriage of justice. This ground is dismissed

(ii) inconsistent statements

Several issues of inconsistent statements raised by the appellant, omnibus submission alleges that the trial judge erred in fact and law not summing up properly on this matter, with particular reference to PW3's Pita Keni's evidence that the room where the rape took place was empty. The appellant through counsel contends that an empty room means no bed and no mats. Whereas PW3 Pita Keni's evidence was that 'empty"' because there was no one in the room. The was no inconsistency but difference shades of emptiness. Either way it was empty of human occupation.

[26] In both the issues discussed above, the appellant did not provide any evidence to back the claim he makes. The summing up that covers the identification issue, and what was stated by the trial judge, was proper and adequate. On the claim of inconsistent statements of PW3 Pita Keni about the empty room, it is clear from closer examination that there was no inconsistency in the statements. Defense Counsel in cross-examination tried without success to shake PW3 Pita Keni's evidence on what he meant in his evidence in chief that the room was empty, was not that it did not have a bed or chair, rather that there was no person in the room.

[27] Taking these claims of inconsistencies at its highest, and in the context of totality of the evidence there is no miscarriage of justice. This ground has no merit.

Unfairness in the Trial Process

[28] Under these heading of assessment by the court, the following submissions by the appellant are covered:

(i) Appellant Excluded during summing up

The appellant was not present during the summing up, due to some misunderstanding. The important point is the trial, especially the evidence taking part, was completed and the trial had adjourned overnight for summing up. The appellant was not present when the court resumed the next day. He had notice.

Having perused the Court Record there is no record of the appellant being absent. Section 14(2) (h) (i) of the Constitution is relevant here. There is no evidence in the court record to support this claim but the appellant was present the day before when he heard that the court adjourned to next day for the summing up.

More importantly the appellant's counsel was present during the summing up, in that context it is unlikely that his absence had prejudiced his case in anyway. This ground has not merit.

(ii) Discriminatory remarks

This is a complaint by the appellant which is difficult to comprehend, mainly because in his effort to provide evidence to support his claim he was picking sentence out of context in the trial judge's summing up and trying to give them meaning it does express in the context from which the sentence were taken. For example, at page 274 of the Court Record, is page 6 of the summing up, which states at paragraph 20 'She admitted that there was no formal identification parade at the station, but she saw him there and identified him **as the rapist.**' This reference to the appellant 'as the rapist' is claimed by him to be discriminatory.

In the context of the trial itself, referring to the appellant as the rapist at that stage of the trial before he was conviction and in the summing up, is unfortunate and unfair. It was the only such reference and in the context of all the other evidence, it did not result in miscarriage of justice.

The second complaint by the appellant relates to paragraph 5 of the Summing up at page 270 of the Copy Record, the trial judge found it proper to make the following statement 'You must look at the evidence dispassionately and with wisdom of your experience of the community and **the Fijian lifestyle**.'
The reference to Fijian lifestyle and the context in which it is made, is indeed unnecessary, belittling, and condescending. But is it sufficient to result in

miscarriage of justice given the totality of the evidence in this case. I do not think so.

(iii) Trial Judges interaction with witnesses

This is a complaint that does not fully appreciate that judges of the High Court, have inherent jurisdiction to ensure that their courts work effectively. The inherent powers of the high court conferred by section **100 of the Constitution** gives broad power to the court to conduct its affairs in effectively dispensing justice and the rule of law [see; **State v Vishal Chand & Ronil Ram** [2015] FJCA 64, AAU0085/2012.]

The trial judges interaction with witnesses in this instance is proper and a normal occurrence in most cases.

(iv) Incompetent Defence Counsel

This ground of appeal is self- serving, scandalous and misconceived. It is dismissed without further consideration.

Defective Charge

[29] The appellant claims in this ground of appeal that the trial judge erred in law when he allowed the Information to be amended in the course of the trial, thus rendering the amended information uncertain and misleading. No supporting evidence of uncertainty or prejudice to the appellant's defence was submitted. The respondent [State] submits that amendment of the Information with regard to count 2 [Attempting to Pervert the Cause of Justice], brought clarity in what the charges the appellant was facing and more difficulty for the prosecution to prove its case. In other word the amendment benefits the appellant not prejudice him.

[30] As a matter of law, the state may amend the charges at any time in the trial before closure of its case. The issue is not, that the court allowed the amendment to be made, the issue is whether the amendment of the prejudiced the proper and effective conduct of the defense case: **Section 214(10) of the Criminal Procedure Act**. As was pointed out by state

counsel, the amendment favored the appellant in that it focused the date of the offence to a date and not between several days. This certainty would favor the appellant. This ground has no merit.

Failure to produce Medical Report

[31] It is in evidence that the complainant was medically examined and a medical report was prepared. A copy was disclosed in the list of disclosures. It was not produced in court by the prosecution to support its case. It is the prerogative of the prosecution to bring evidence that they decide is necessary to prove the charge Prosecution decide what to produce to prove the charges it has brought against the appellant. In law that report can only be introduced in court if the maker [i.e., the Medical Doctor] who prepared it, gave evidence in trial. The Medical Report was not evidence in the trial and therefore Defense Counsel may not refer to it, as if it was. Against that background the direction of the trial judge in paragraph 4 of Summing up [Page 270 Copy Record] was proper, when he said '*I ask you to ignore Mr. Moapa's comments in closing about the lack of medical evidence. Maybe she never saw a doctor? Medical evidence was not called for and you are not to speculate why.*''

What is clear is that appellant is again unable to substantiate this ground of appeal. It is dismissed

[32] Having undertaken to cover all the grounds of appeal urged by the appellant, I am unable to find any of them has merit and would enable this Court to allow the appeal. The totality of the evidence is such that there is no miscarriage of justice in this trial. All the grounds of appeal are dismissed.

Qetaki, JA

[33] I have considered the judgment in draft and agree with it and the reasoning.

Bull, JA

[34] I agree with the reasons and orders of Mataitoga JA.

ORDERS:

Appeal against conviction is dismissed.

Conviction in the High Court affirmed.

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Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

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Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

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Hon. Madam Justice Siainiu Bull
JUSTICE OF APPEAL