IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0009 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0029/2015; High Court No: HAC HAC 99 of 2014]

BETWEEN: **RAJENDRA GOUNDAR**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice Salesi Temo, Acting President of the Supreme Court**
The Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: **Mr M Fesaitu and Mr K Prasad for the Petitioner**
Ms S Shameem and Mr J Nasa for the Respondent

Date of Hearing: **7th June, 2023**

Date of Judgement: **29th June, 2023**

JUDGEMENT

Temo, AP

[1] I have read His Lordship, Mr Justice Alipate Qetaki's draft judgment. I entirely agree with it. I agree with his reasoning and conclusions.

Mataitoga, J

[2] Agree with reasons and orders made.

Qetaki, J

Background, Court's jurisdiction and power

[3] The Petitioner seeks special leave to appeal against the judgement of the Court of Appeal dated 27 February 2020 dismissing his appeal. He is legally represented in this appeal by the Legal Aid Commission pursuant to an Order of the Honourable Acting Chief Justice made on 9 May 2023 that the Commission represent the Petitioner in the hearing of the petition to leave to appeal. The Petitioner was charged with one count of sexual assault contrary to section 210 (1)(a) of the Crimes Act 2009, and two counts of rape contrary to Section 207(1) and (2)(b); and 207(1) and (2))(a) of the Crimes Act,2009.

[4] The offence of rape is defined in Section 207 of the Crimes Act 2009 ("the Act") as follows:

> *"207 (1) Any person who rapes another person commits an indictable offence.*
>
> *(2) A person rapes another person if:*
> *(a) the person has carnal knowledge with or of the other person without the other person's consent; or*
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*
> *(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*
>
> *(3) For this section, a child under the age of 13 years is incapable of giving consent."*

[5] The offence of sexual assault is defined in Section 210(1) (a) and (b) of the Crimes Act as follows:

> *"210(1) A person commits an indictable offence (which is triable summarily) if he or she-*
> *(a) unlawfully and indecently assaults another person; or*
> *(b) procures another person, without the person's consent-*
> *(i) to commit an act of gross indecency; or*
> *(ii) to witness an act of gross indecency by the person or any other person…"*

[6] The Supreme Court jurisdiction to adjudicate on this Petition and its powers are conferred by the Constitution of the Republic of Fiji. Subsections (4) and (5) of Section 98 of the Constitution state:

> *"(4) An appeal may not be brought to the Supreme Court from a final judgement of the Court of Appeal unless the Supreme Court grants leave to appeal.*
>
> *(5) In the exercise of its appellate jurisdiction, the Supreme Court may-*
> *(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal, or*
> *(b) make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs."*

[7] The special leave to appeal requirements are set out in Section 7, subsection (2) of the Supreme Court Act, which states:

> *"In relation to a criminal matter, the supreme Court must not grant special leave to appeal unless:*
> *(a) a question of general legal importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial and grave injustice may otherwise occur."*

Facts

[8] The offences were alleged to have been committed by the Petitioner on a 14 years old girl (the "*Complainant*") at the time of the incident, who was the Petitioner's biological daughter, on 20th July 2014.

[9] Evidence of the complainant at the trial was that she was living in Rakiraki with the Petitioner, her mother and her four siblings. The complainant was at home on 20 July 2014, the date of the incident, with the Petitioner. The Petitioner had cooked rice for their meal as her mother had been away with the grandmother. The Petitioner told the complainant not to cook dhal curry and they could go to the shop and buy tinned fish.

[10] On their way to the shop the complainant was tricked by the Petitioner and she was asked to walk through a jungle to recover some *"'paint'* that was hidden. While the complainant

was searching the '*paint*,' the Petitioner approached the appellant, held her by hand, and told that he wanted to suck her breasts. The Petitioner then started sucking the breasts, in the process of which, the complainant fell on the ground. The Petitioner then threatened the complainant with death if she raised an alarm.

[11] The Petitioner, thereafter, got the complainant to lower her pants and poked his finger into her vagina. The Petition continued further with his sexual invasion and begins to insert his penis into the complainant's vagina while asking whether it was painful.

[12] The complainant asserted that she had not consented to any of the acts committed by the Petitioner. Soon after the incident, the complainant ran to a nearby house occupied by one Mala who assisted the complainant to contact her mother to come by Mala's telephone. The complainant narrated the incidents that took place to her mother who rang the police to come immediately.

[13] The complainant when cross-examined by the Petitioner emphatically answered that she was raped by the Petitioner and stood by her evidence in court as promptly narrated to her mother on the date of the incident.

[14] The mother of the complainant, Aswin Ashika Lata, 36, in her unchallenged testimony, confirmed that the complainant had told her that it was the Petitioner who had committed the acts complained of, when she was called on telephone and after her arrival at Mala's place The witness said that the police were summoned immediately thereafter on hearing what had been done to the complainant by the appellant.

[15] Sangeeta Mala, a teacher by profession, to whose house the complainant ran and got her mother down, too, testified and confirmed what the complainant stated in her evidence. Her evidence, too was unchallenged as the Petitioner choose not to cross examine.

[16] Dr Alumita Serutabua, had examined the complainant around 9:00pm on 20 July 2014. The doctor had recorded the history of the person at her examination and had made

specific findings stating that the hymen was bruised and lacerated. She had noted the presence of dried blood stains at the lacerated site, and found that the hymen was not intact It was the opinion of the doctor that that the examination was consistent with a forceful penetration of the vagina of the complainant and the injury was of recent onset. The Medical Examination Form, where the history of the complainant; the findings; and the conclusions were recorded, was tendered as a production exhibit '*PE-2'*. The doctor's evidence remained uncontroverted as the Petitioner did not choose to cross examine the doctor on any matter the doctor testified on.

[17] The prosecution also presented evidence on caution-interview. The police officer, who conducted the interview under caution, produced the statement as a production exhibit marked as '*PE-4(A)'* where the appellant had admitted the act of sucking the breasts of the complainant. The witness's evidence was sought to be challenged on the basis that the appellant was subjected to assault at the time when the statement was recorded.

[18] The Petitioner gave evidence and denied the charges. He testified specifically on the fact of being assaulted when his statement was taken under caution. The Petitioner produced the Medical Report as '*D-1'* where the history related by the person to be examined was recorded as having said *'Documentation of any injuries to the patient'* in column D10 of the Report. The medical doctor had not noted any significant findings on examination of the Petitioner in the form of physical injuries at the examination carried out around 10:00am on 21 July 2014, however, before the caution interview. The Petitioner called no other witnesses in his defence.

[19] After the trial the assessors returned a unanimous opinion of guilty on 21 January 2015.The learned trial judge agreed with the opinion of the assessors and convicted the appellant on the respective charge in each count.

[20] On 27 January 2015 sentenced the Petitioner to a term of fourteen years and six months imprisonment with a non-parole period of twelve years.

Leave to appeal under Section 21(1) Court of Appeal Act

[21] The Petitioner filed a timely appeal on 30 January 2015 to the Court of Appeal pursuant Section 21 (1) of the Court of Appeal Act. An amended notice of appeal was filed on 15 May 2018 where five grounds of appeal were urged against conviction and sentence.

[22] A single Judge of appeal by ruling date 04 December 2018 granted leave to appeal in respect of three grounds of appeal against conviction and refused leave to appeal against the sentence on the basis that there was no arguable error in the sentence.

Hearing before full court

[23] At the hearing before the full Court of appeal, the Petitioner was represented by counsel who confined himself only to two grounds challenging conviction abandoning the other grounds. The two grounds were:

> *"(i) The learned trial judge should not have directed the assessors on the history related in the medical report, which is hearsay, therefore, causing prejudice to the appellant; and*
>
> *(ii) The learned trial judge erred in law and in fact in not adequately directing the assessors on the confession contained in the caution statement particularly whether the appellant had made the confession."*

[24] The Full Court of Appeal considered the challenges to the conviction based on the two grounds and in light of the evidence adduced at the trial. The learned counsel for Petitioner focused on paragraphs 40 and 41 of the Summing Up of the learned trial Judge, where he stated:

> *"[40] Doctor was called as the next witness for the prosecution. She is a doctor with 7 years' experience. She had examined the victim on 20.7.2014 at 9. 00am.Medical findings where hymen was bruised small 1 cm laceration at 9o'clock position. Dried blood noted at the laceration. Hymen was not intact. Possible cause could be forcible penetration into vagina with any object. The findings are consistent with the history. The injury is a recent one. The witness was also not cross-examined by the accused.*

[41] The doctor is an independent witness. If you believe her evidence there is confirmation on penetration to the vagina. This is a fresh injury. You have to decide whether this evidence is confirming the evidence of the victim before attaching any weight to this evidence."

[25] The learned counsel's complaint is founded on the rule against hearsay evidence, which primarily bars the admission of evidence on matters heard outside without them being elicited within the precincts of court. Learned counsel relied on the Court of Appeal decision in **Delailagi *v* State** [2019] FJCA 186; AAU0060.2015 (03 October 2019 on the need to exclude hearsay evidence.

[26] The Court of Appeal rejected the first ground of appeal as being without legal merit, on application of the legal principles relating to hearsay, in light of the facts and circumstances of that case where the full Court took the opportunity to consider the ambit of the rule against hearsay evidence given the changes and developments the legal principles have undergone overtime in many jurisdiction. There the court adopted the determination as regards hearsay as explained in: **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 at 969, where the matters in issue touch on the fundamental exclusionary perimeters of hearsay. There, it was held:

"Evidence of a statement made to a witness …may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay when it is produced to establish by the evidence, not the truth of the statement, but the fact that it was made."

[27] Thus, it was held in **Delailagi v State (supra),** with reference to its facts and circumstance:

"[32] …. the prosecution did not rely on the evidence of history being narrated to the doctor to establish its truth but to establish that such a statement was made to the doctor when the opportunity was accorded. The truth of the statement made in the form of the history of the complainant prior to the medical examination was sought to be established by the prosecution through the best evidence of the complainant-TL herself. The prosecution, going by the

transcript of evidence, had not chosen secondary evidence such as the history recorded by the doctor to establish its case. In that light, the learned counsel's submission that this item of evidence had offended the hearsay rule is not entitled to succeed because that item of evidence was not used to establish its truth."

[28] As in that case, the Court of Appeal applied Delailagi's case on that point, firstly, because the prosecution in this case, did not rely on the history recorded and testified on by the medical doctor to establish the truth of the prosecution story. Secondly, as in that case, the prosecution relied on the best evidence that emanated from the complainant herself, the creditworthiness of her testimonial, heavily weighed in favor of its quality taken together with the complainant's spontaneous response in fleeing the crime scene to a nearby house, followed by her prompt action in seeking assistance from Sangeeta Mala so that she could speak to her mother to tell her about the incidents that her mother testified at the trial, being a reliable witness in court.

[29] The Court of Appeal also observed that from evidential perspective, the history recorded by the doctor on enquiring the complainant-victim soon after the incident offers, only consistency to the complainant's story and nothing more. The Court was of the view (per Nawana JA, at paragraph [32]) that the history in the evidence by the doctor, could not have caused the case to miscarry resulting in prejudice to the Petitioner on the basis of a purported admission of hearsay evidence.

[30] The Court of Appeal commented that eliciting of evidence from a witness in all matters that he or she was subjected to at or around the occurrence of the event that the witness was subsequently testifying on, should, as a good prosecutorial practice be adhere to.

[31] The learned counsel for the state rightly did not contest the issue. While conceding to the error on the part of the prosecuting counsel and the learned judge, the learned counsel for the state relied on **Navaki v State** [2019] FJCA 194; AAU0087.2015 (03 October 2019) where the court held the same view on the issue of failure on the part of the prosecution to elicit the short history recorded in the medical report as part of the prosecution case.

[32] The legal question that the Court of Appeal has to address is whether the error was capable of causing a substantial miscarriage of justice. The House of Lords in **Stirland v Director of Public Prosecutions [1944]** AC 315 laid down the guideline, which the court in **Navaki's c**ase suitably adopted.

[33] The statutory provisions of Section 23(3) of the Court of Appeal Act of Fiji are identical in contend to the provisions of the English Criminal Appeal Act, 1907, by which the governing guideline has been statutorily enacted for court to consider whether there was a substantial miscarriage of justice caused as a result of the error complained of.

[34] While there is basis for the complaint by learned counsel for the Petitioner, the court was not convinced that the complaint can justifiably be used as a ground so as to affect the validity of the conviction because the evidential lapse committed at the hands of the learned prosecuting counsel had not made the relevant evidence hearsay. In the circumstances, there was no room to taint the conviction; or to cause prejudice to the appellant on the basis of any misreception of evidence. There was no substantial miscarriage of justice caused to the appellant by reference to the medical history by the doctor; and by the learned judge adverting the attention of the assessors to the medical history in the course of his summing up.

[35] The second ground of appeal was premised on the alleged inadequacy of directions on the confession in the case, learned counsel for the state relied on caution-interview statement particularly whether the appellant had made a confession. Paragraphs [43], [44] and [45] of the trial Judge's Summing Up were the subject of the complaint:

> *"43. DC Aveen Kumar was the next witness for the prosecution. He had cautioned interviewed the accused at Rakiraki police station. It was in Hindi language. It was recorded in the computer. It was printed and given to the accused to read and sign. Surendra Prasad was witnessing officer. He identified and tendered the original Hindi interview marked PE 4A and English translation marked PE4B.He read the English translation to court. There was no complaint from the accused before the interview. He was not assaulted at the reconstruction. He was not assaulted at the end of the interview. The accused gave answers to all questions asked by him.*

44. Under cross examination he denied that another officer assaulted the accused while the interview being taken. He denied that the accused was slapped on the ears. He denied telling that if you don't tell the truth he will break the accused's nose.

45. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you have to further decide whether facts in this caution interview statement are truthful; If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the element of the charges are proved by this statement."

[36] The Court of Appeal considered its own decision in **Korodrau v State** [2019] FJCA 193; AAU 090.2014 (3 October 2019), which relied on **Tuilaselase v State** [2019] FJSC2; CAV 0025 of 2018; **Mc Greevy v DPP** [1973] 1 WLR 276, in relation to Summing Up on the caution interview in Fiji, held that:

"[60] ……. [I]t appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgement (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant."

[37] The Court of Appeal ruled against the second ground of appeal based on the above statement, after having considered the summing up by the learned trial Judge as adequate in dealing with matters pertaining to the caution-interview and the confession as contained in the statement. At paragraph [48] the Court stated:

" ……. [I] am unable to find an error based on a misdirection or a non-direction so as to affect the validity of the conviction. The conviction, in any event, was not based solely on the confession but on the complainant's testimony, which met the tests of spontaneity and consistency for it to be relied on by the assessors and the learned Judge to act on."

[38] In consequence the second ground is found to be of no merit and was rejected. Having rejected both grounds the Court of Appeal dismissed the appeal.

Application for leave to Supreme Court

[39] The Petitioner filed a Notice of Leave to File Additional Grounds on 11 March 2020 for leave to appeal to the Supreme Court. The Additional Grounds of Appeal against Conviction were:

"1.1 That the trial was prejudicial through lack of legal representation.

1.2 That the summary of facts failed to disclose each elements of the offence that the petitioner is convicted for.

1.3 That the Learned Appellate judges erred in law in failing to make an independent assessment on the evidence before affirming the verdict of guilty was unsupported, unreliable and inconclusive giving rise to a grave miscarriage of justice.

1.4 The admissibility of complaints by the victim and the direction of the Learned Trial Judge on the effect of recent complaint on the assessment of the complainant's evidence.

1.5 That the Learned Appellate judges erred in law and in fact in failing to consider carefully and in detail on the issue of inconsistence evidence given by the witness complainant (Sweta), Sangeeta Mala, Investigating Officer (Aveen Kumar).

1.6 That the evidence led at trial was insufficient to convict the petitioner on the charges of rape, therefore trial judges' failure to convict the petitioner on the charge of sexual assault."

[40] An Amended Petition for Leave to Appeal was filed by the Petitioner in Person on 22 May 2023 urging one ground only upon which the Petition is based:

"Conviction

Ground A

The learned Judges direction at [59] of the summing up on corroboration is inadequate and a misdirection when taken in conjunction with the directions at [39] and [41]."

The relief sought by the Petitioner are: (1) That the leave to appeal is granted; (2) That the appeal against conviction is allowed; (3) That any other orders that the Honourable Court deems just.

Special leave to appeal requirements - Section 7 (2) Supreme Court Act,Cap.13)

[41] Section 7, subsection (2) of the Act sets out the requirements for grant of leave to appeal.

[42] The Petitioner has to establish that his request for grant of special leave to this Court comes within the ambit of the Act. The Petitioner did not in its written submission point out how this application for special leave to appeal measure up to and or satisfy all or any of these requirements.

[43] The threshold for granting special leave by the Supreme Court is very high as set out in **Livai Mala Matalulu and Another v. Director of Public Prosecutions** [2003] FJSC 2; (17 April 2003):

"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."

[44] In this application the ground of appeal raised by the Petitioner is a new ground that was not raised and argued in the Court of Appeal and this raises legal issues of its own. Although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised in any court below, it will not be entertained ***'unless its significance upon the***

special leave criteria was compelling [at paragraph 28.]: **Eroni Vaqewa v.The State** [2016] FJSC 12; CAV0016.2015 (22 April 2016).

[45] In considering the issue of whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial court, Justice L' Heureux-Dube in **R v Brown** [1993] 2 SCR 918, 1993 Can Lii 114 (SCC) in his dissent said:

> *"Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three perquisites must be satisfied in order to permit the raising of a new issue…., for the first time on appeal: first there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result."*

Petitioner's Case

[46] In his written submission filed on 22 May 2023 (see paragraphs 2.5 & 2.6) the Petitioner abandoned the six grounds of appeal filed on 11 May 2020 confirming that the only one ground he will pursue is:

> *"Ground (a)*
> *The learned trial judge's direction at [59] of the summing up on corroboration is inadequate and a misdirection when taken in conjunction with the directions at [39] and [41] respectively."*

[47] As confirmed by counsel for the Petitioner at the hearing of the application, this is the only ground of application for special leave to appeal. At paragraph 6 of his submission the Petitioner prays that; *"The Honourable Court considers the two grounds of appeal against conviction.* "This was also amended by counsel for consistency.

[48] The Petitioner relies on the Judgement in **Prasad v State** [2019] FJSC 3; CAV 0024.2018 (25 April 2019) to support the ground of appeal as according to the submission a similar complaint was raised in that case.

[49] It is not in dispute that at the trial in the High Court, the Petitioner in his evidence denied the allegations against him. According to his evidence he had pulled the complainant's hand to go faster and in doing so she had run away. He had a problem with the complainant that a guy had come to the house without his permission. He was beaten in the ears by the police and he was told if he did not tell the truth he would be assaulted.

[50] In the Petitioner's record of caution interview statement, translated version, pages 96-98 of the Record of the High Court the Petitioner's admission are only to the Petitioner sucking the complainant's breast but no admissions are made in respect of the two counts of rape (see Q &A: 17, 18, 22, 23, 24 and 25). The same position is noted in the recordings of the charge interview, translated version (page 102 of Record of the High Court).

[51] The Petitioner's complaint centers on the direction to the assessors in the summing up in paragraph 59, which direction states:

> *"Please remember there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is therefore to have some independent evidence to support the victim's story of rape" [*Emphasis added).

[52] The Petitioner, relied on the discussion of principles contained in the following passage from **Prasad v State** (supra), where a similar complaint as in this case, was raised:

> *"The effect of this passage was that the assessors were being told that they could conclude that Prasad was guilty even if there was no corroboration of the girl's account. But they could also take into account such corroboration of her account as there was in deciding whether her account was true. That meant that the judge had to explain to the assessors what evidence was capable of amounting to corroboration. The help he gave them was that it was "independent evidence "which supported her account. That was entirely correct, but some explanation of what "independent" meant in this context was required. It did not mean that evidence had to come from someone who was independent in the sense that they did not know the girl. In other*

words, she could not be the ultimate source of the evidence if the evidence was to amount to corroboration of her account."

[53] The Petitioner alleges that the learned trial judge had not elaborated on what is meant by independent evidence as was discussed in **Prasad**. That the assessors ought to be told in the context that the independent evidence coming from the doctor (4th prosecution witness) did not corroborate the complainant's story of the allegations. The Petitioner submitted that the doctor's evidence is not direct evidence to the allegations of the sexual assault and rape. The doctor's evidence goes only to medically examining the complainant. The direction to the assessors regarding the doctor being an independent witness is contained in paragraph 41 of the summing up, as follows:

"The doctor is an independent witness. If you believe her evidence there is a confirmation on penetration to the vagina. This is a fresh injury. You have to decide whether this evidence is confirming the evidence of the victim before attaching any weight to this evidence."

[54] The Petitioner submitted that considering the direction in paragraph 59 of the summing up and read together with the direction at paragraph 41, that the assessors would have accepted that the doctor being referred to as an independent witness makes her evidence as independent evidence when in fact the doctor's evidence does not corroborate the complainant's evidence that she was raped.

[55] The Petitioner also submitted that in the judgement of the learned trial judge at paragraph 3, the trial judge had directed himself to the directions given in the summing up. The Petitioner submits that at paragraph 5 of the judgement, the trial judge had stated that the medical evidence is consistent and confirms the evidence of the complainant. The Petitioner contends that it could be inferred that the learned trial Judge had not considered the irregularities of the directions complained of'. The Petitioner submitted that due to that, that the trial Judge's errors in Summing Up are material and affects the safety of the conviction.

[56] Regarding the evidence of Sangeeta Mala (3rd prosecution witness) in light of the direction given to the assessors at paragraph 39 of the summing up which is as follows:

"This is an independent witness, You have to decide whether this evidence is confirming the evidence of the victim or creating a reasonable doubt in the prosecution case."

[57] The Petitioner submits that Sangeeta Mala's evidence relates to what she had seen. That the complainant had come to her house crying and looking scared. That there is no evidence coming from the complainant informing the witness of the allegations. Neither did she hear the complainant and her mother talking about the allegations.

[58] Further, the Petitioner submitted that the learned trial Judge had not stated as to what evidence of Sangeeta Mala has confirmed that of the complainant's and with the trial Judge have made reference to the witness as an independent witness, Sangeeta Mala's evidence is not independent of the complainant in the sense that the complainant's evidence is not the ultimate source of evidence as to the allegations. The petitioner submitted that the assessors would have had the impression that Sangeeta Mala's evidence had corroborated the complainant's account that she was sexually assaulted and raped by the Petitioner.

Below is the account on the Summing Up (paragraph [39] and the Judge's Notes from the Record of the High Court of Fiji.

[59] The learned trial Judge in referring to PW3 Sangeeta Mala's evidence, stated:

> *"This is an independent witness. You have to decide whether this evidence is confirming the evidence of the victim or creating a reasonable doubt in the prosecution case."*

What evidence did PW3 gave at the trial? In her evidence she said these:

> *Question & Answer 3:*
> *"What happened?*
> *My door was not locked but closed. All of a sudden someone pushed the door and came inside. It was the victim girl she was crying and she looked very scared. I asked her what happened and she said nothing happened. She asked me you can drop me home."*

Question & Answer 4:
"What is your response?
You are roaming around at this time and I am busy cooking for kids. Can you make a call to my mum to come and pick me. So, I asked her for number and dial the number. I gave the phone to her to talk to mum. After that I went to cook asking her to wait in the seti for mum. Mum came 10 minutes later she called her from outside she stood up and went to the mum. Mum asked in front of me what happened. She said let's go I will tell."

Question & Answer 5:
"This girl do you know her name?
No. Her grandparents are my neighbors they call her Swetha."

[60] There was no cross-examination on PW3's evidence. Her evidence did not *mention anything about what the father allegedly did to the girl. The girl said that* "Let's go I will tell". She did not say what made the girl scared or why she was crying. Either she did not know or she was not asked a question related to those issues. Her evidence confirmed that the girl came to her house, was assisted to make her call to her mum, her mum came and left with the girl, who she knew as Swetha.

Below is the account on the summing up (at paragraph [41] and the Judge's notes from the Record of the High Court of Fiji.

[61] The learned trial Judge in referring to PW4 Doctor Alumita Serutabua, stated:

> *"41. The doctor is an independent witness. If you believe her evidence there is confirmation on penetration to the vagina. This is a fresh injury. You have to decide whether this is confirming the evidence of the victim before attaching any weight to this evidence."*

There was no cross examination. What evidence did she give at the trial?

Question & Answer 14
"D 12 medical findings
Hymen bruised and small laceration
Dried blood noted. Hymen not intact"

Question & Answer 15
"What did this mean in hymen terms?
Hymen is a tissue that surrounds opening of vaginal orifice. Hymen is noted to be bruised color was pink reddish there is small cut a lateral aspect 1 cm in length."

Question & Answer 16
What is the possible cause of this finding?
Could be forceful penetration into vagina of any object"

Question & Answer 19
'From the history are findings consistent with history?
Yes."

Question & Answer 20
"What is your opinion?
Examination is consistent with forceful penetration into the vagina injury is of recent onset."

This is Paragraph [59], being challenged by the Petitioner.

[62] The Learned Trial Judge's Summing Up, states:

> *"59. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape."*
> *[Underlining added]*

Respondent's Case

[63] The respondent submitted that it is the direct evidence of the child victim that established the commission of the offence. The evidences of her mother, the teacher, the doctor and the partial admission of guilt of the Petitioner were supportive of the complainant's direct evidence, which had established the commission of the offence by the Petitioner. There was no need for corroboration by the evidence of the PW3 (the teacher) or PW4 (the doctor). That being the position, the respondent submitted that the summing up was not inadequate or amounted to a misdirection *vis a vis* paragraphs 39 and 41 of the summing up.

[64] The respondent argued that the Petitioner relied on **Prasad v State** (supra) in arguing that, firstly, the learned trial judge should have explained what independent evidence was, and secondly, that the evidence of the medical officer was not direct evidence of the allegations of sexual assault and rape but only went as far as examination of the complainant. The respondent further argued that, **Prasad v State (**supra) is distinguishable in that this Court (Supreme Court) had declared a mistrial on the basis that the learned trial Judge had seriously misdirected the assessors by saying that an independent witness and the medical officer corroborated the complainant's evidence, when in law, such evidence was actually regarded as recent complaint evidence and medical evidence and did not corroborate the complainant's evidence.

Analysis of Submissions of Parties

[65] I have carefully considered both submissions ably put before the Court by the learned counsels of the Petitioner and the State, the relevant parts of the Summing Up the focus of the only ground of appeal, and the respective submissions and authorities in support. In addition, I have taken into account the decision of the Court of Appeal that is being challenged by the Petitioner, and the reasons for the decision made.

[66] I am in agreement with the respondent's submission that this case is distinct further, it is distinguishable from **Prasad** (supra). The learned trial Judge had correctly identified the complainant's mother's evidence as recent complaint at paragraph 37 of the summing up. The learned trial Judge also summarized Sanjeeta Mala's evidence as led in trial and correctly identified that it was for the assessors to consider whether her evidence confirmed the complainant's evidence as far as that (to the extent that) she went to Sanjeeta Mala and used her phone to call her mother. The learned trial Judge also dealt with the medical officer's evidence at paragraphs 40-41 and stated that her evidence went as far as to say that if the assessors believed her evidence, she had noted fresh injuries confirming penetration of the vagina. Thus, it was for the assessors to see whether this confirmed the complainant's evidence before attaching any weight to it.

Conclusion

[67] The Petitioner's application for special leave to appeal conviction is refused as the arguments raised does not fulfil the criteria set out in Section 7(2) of the Supreme Court Act. As I have in the process also considered the merit of the appeal, the appeal to this court is dismissed. Conviction is affirmed.

Order of Court

1. *Application for leave to appeal is refused.*
2. *Appeal against conviction is denied.*
3. *Conviction affirmed.*

The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court

SOLICITORS:

Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecution for the Respondent