IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 8 of 2021
(Court of Appeal No. AAU 16 of 2016)
(High Court No. HAC 29 of 2014)

BETWEEN : **HIND MUNISHWAR LAL**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice William Calanchini**
Judge of the Supreme Court

The Hon. Madam Justice Dame Lowell Goddard
Judge of the Supreme Court

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

Counsel : **Petitioner in person**
Dr. A. Jack for the Respondent

Date of Hearing : **8 August 2023**
Date of Judgment : **30 August 2023**

JUDGMENT

Calanchini J

[1] The Petitioner seeks leave to appeal the decision of the Court of Appeal delivered on 3 June 2021 dismissing the Petitioner's appeal against conviction and sentence. Although the date stamp indicates that the Petition was lodged in the Registry on 21 July 2021, the typed date on the letter from the Fiji Corrections Service is 3 June 2021. Under those circumstances the practice has been to treat the Petition as timely on the basis that the cause of the subsequent delay was beyond the control of the Petitioner.

Introduction

[2] The Petitioner was tried on four counts of rape the particulars of which, apart from the date, were identical and stated that, on 18 February, 24 February, 4 March and 5 March 2014 at Labasa the Petitioner had carnal knowledge of S. A. C. without her consent. Following a trial before a Judge sitting with three assessors the assessors returned unanimous opinions of guilty on all four counts. On 27 August 2015 the Petitioner was sentenced to 14 years imprisonment on each count to be served concurrently with a non-parole term of 12 years. Being aggrieved by his convictions and sentences the Petitioner filed an application for an enlargement of time for leave to appeal against the convictions and sentences. Leave was subsequently granted. The Court of Appeal in its written judgment dated 3 June 2021 dismissed the appeal against convictions and sentences.

The Trial

[3] The Prosecution alleged that the complainant was 18 years old at the time of the offences. She had commenced her studies at the Fiji National University Labasa campus to become a teacher. The Petitioner was 25 years old and had been studying for the previous five years and at the time was undertaking a Diploma Course in Applied Computering at the same campus.

[4] It was alleged by the Prosecution that after the complainant and the Petitioner met at the Labasa Bus Station the Petitioner promised to assist the complainant by giving her some FNU papers and text books. They brunched together and then walked to the Petitioner's

residence to collect the papers and text books. The complainant was told to sit on the bed and after the Petitioner returned from the wash room he locked the door. He then forcefully removed the Complainant's clothes and placed his hand over her mouth as he proceeded to have sexual intercourse with her. It was alleged that the complainant did not consent to sex with the Petitioner and that he knew at the time that she was not consenting.

[5] It was alleged that the Petitioner then threatened to detain the complainant unless she allowed him to take photos of her naked with his mobile phone. After the photos were taken the Petitioner arranged a taxi for the complainant informing her that if she failed to attend for sex in the future he would place the photos on Facebook for everyone to see. The Complainant then felt under pressure.

[6] Consequently on three separate occasions (24 February, 4 and 5 March 2014) the Petitioner called the Complainant via his mobile phone. On each occasion the Petitioner threatened the Complainant that if she did not come to him he would place the photos on Facebook. On each occasion the Complainant met the Petitioner and on each occasion he took her to his residence and had sexual intercourse with her without her consent. The Prosecution alleged that on each occasion the Petitioner was aware that the complainant was not consenting to sex.

[7] The Petitioner pleaded not guilty and gave evidence in his defence. He admitted that he had sexual intercourse with the Complainant on the four occasions as alleged by the Prosecution. He claimed that the sexual intercourse was consensual and that he knew she was consenting because he saw her smiling at him and because she was holding his back tightly, in other words that she was enjoying the sexual intercourse on each occasion.

[8] The learned Trial Judge agreed with the unanimous opinions of guilty on all four counts and proceeded to convict the Petitioner accordingly in a brief written judgment on 26 August 2015. The Judge indicated that having heard the evidence of the complainant and the Petitioner and having observed them in the court room he concluded that the complainant was a credible witness whose evidence he accepted. He concluded that the Petitioner was not credible and that he was evasive and argumentative.

Court of Appeal

[9] By the time the application for an enlargement of time came on for hearing before a Judge of the Court of Appeal, the Petitioner had raised a total 26 grounds of appeal against conviction and 6 grounds of appeal against sentence. The learned Judge noted that ground 6 raised a question of law alone for which leave was not required and granted leave on all other grounds of appeal against conviction to enable them to be considered with the benefit of the complete Appeal Record which is only finalized after the leave hearing. Leave was granted to appeal against sentence on all but one of the grounds put forward by the Petitioner.

[10] By notice dated 24 March 2020 the Petitioner indicated that out of the grounds of appeal previously filed he was relying on 9 grounds of appeal against conviction and 2 grounds of appeal against sentence. The grounds of appeal against conviction relied upon by the Petitioner in the Court of Appeal hearing were:

> *"1. That the learned Trial Judge erred in law and fact by failing to provide a fair and balanced summing up when directing the assessors in particular to the following: a) Trial Judge did not sum up properly the important answers made by the accused which was relevant to the defence which he relied upon. b) Lacked to analyse and to summarise the evidence of all witnesses between the prosecution and the defence fairly.*
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> *2. The summing up lacks adequate direction on what inference the assessors may have drawn, if they so wished from the totality of facts on the issue of consent. There was also no mention in the summing up of what transpired on cross examination of witnesses especially the complainant, Interview officer (Sadhamma) and her aunty (Sushila Devi) was called by the Prosecution to give evidence. Their opinion and the laws on inconsistencies were also not outlined to the assessors. There is an error of fact because appellant version of events was not put to the assessors to consider amongst other evidence adduced for the State.*
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> *3. That the learned Trial Judge erred in law and in failing to direct the assessors that has been described as a rule of law on threat but not involving violence constitutes a misdirection and wrong decision which relates to each ingredient and essential element of the charge of Rape contrary to section 207 (1)(2) of the Crimes Act No. 44 of 2009 resulting in substantial miscarriage of justice.*

4. *That the learned trial judge erred in law and fact when he allowed the assessors to look at the evidence and decide who was telling the truth from their point of view (where the truth lies) on the matter of consent implying that the appellant is ought to prove his innocence and misdirecting with regards to Burden of Proof causing a substantial miscarriage of justice. In summing up at paragraph 28 learned Judge directed: 'You have examined their demeanor when they were answering questions asked by counsels, who do you think was the credible witness of the two? Who was the forthright witness? Which of the two was the evasive witness? Who do you think from your point of view was telling the truth? If you think that the complainant (PW1) was the more credible witness then you must find the appellant guilty as charged on all counts. If you think otherwise, then you must find the appellant not guilty as charged on all counts. It is a matter entirely for you.*

5. *That the learned trial Judge erred in law and fact when he failed to properly guide the assessors and how to approach and weigh the fresh evidence of uncharged act.*

6. *That the learned trial Judge erred in law and in fact when he failed in his judgment to give cogent reason to reflect the credibility of the witness.*

7. *That the learned trial Judge erred in law and in fact by expressing the opinion of guilty verdict on the accused and relying on inconclusive, unreliable and insufficient evidence pertaining to forceful act on count one and threat by phone calls on counts 2, 3 and 4 whilst the prosecution failed to disclose statutory requirement.*

8. *That the learned prosecutor failed to tender in court the clothes that were worn by the complainant that includes yellow top, ¾ Jeans, panty, bra because if the allegation was true the clothes, undergarment would have been torn and by not doing so there was a substantial miscarriage of justice.*

9. *That the learned Trial Judge erred in law and fact in misdirecting himself and the assessors on the need of corroborative evidence and danger of convicting without it had to be given where both consent and corroboration are in dispute thereby failure to give such direction constituted to material misdirection and miscarriage of justice."*

[11] The two grounds of appeal against sentence which the Petitioner raised in the Court of Appeal were:

> *"That the learned Judge erred in exercising his discretion to the extent that:*
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> *1. He commenced sentencing at high starting point not using the current sentencing principles and guidelines regards to adult case authorities.*
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> *2. Punished appellant twice by treating the element of offence as an aggravating factor. He was wrong in adding 3 years hence it was of offence and cannot be treated as aggravating factor, therefore by adding 3 years was fatal to conviction."*

[12] The Court of Appeal rejected all nine grounds of the appeal against conviction and the two grounds of appeal against sentence.

Petition for leave to appeal to the Supreme Court

[13] In his original Petition filed on 21 July 2021 the Petitioner listed eight grounds of appeal against conviction and sentence. On various dates between July 2022 and 5 July 2023 the Petitioner filed additional grounds of appeal against conviction and sentence totalling 26 grounds against conviction and four grounds against sentence. However by notice dated 6 July 2023 the Petitioner informed the Court that he intended to rely only on the 13 grounds of appeal against conviction and the ground of appeal against sentence set out in his notice filed in the Court on 5 July 2023. In order to obtain leave the Petitioner is required to establish under section 7 (2) of the Supreme Court Act 1998 that his petition (a) raises a question of general legal importance or (b) raises a substantial question of principle affecting the administration of criminal justice or (c) that if leave is not granted a substantial and grave miscarriage of justice may otherwise occur.

[14] The Petitioner has pleaded ground one as:

> *"The learned Judges of Appeal Court erred at paragraph 27 of the Judgment by treating Sushila Devi's evidence as corroboration or as evidence of the facts complained of thereby failing to consider properly section 129 of Criminal Procedure Decree 2009 and the status of this kind*

of evidence about what Sushila Devi said resulting into substantial miscarriage of justice."

[15] This ground of appeal appears to indicate that the Petitioner has not appreciated the difference between corroboration evidence and recent complaint evidence. It is correct that section 129 of the Criminal Procedure Act 2009 provides that corroboration of the complainant's evidence is no longer necessary in order to secure a conviction for an offence of a sexual nature. Furthermore pursuant to section 129 it was no longer necessary for the trial judge to give a warning to the assessors relating to the absence of corroboration. A complaint about being raped made by the complainant to a third person after the alleged offence within a reasonable time is not corroboration. It is admissible on the basis that demonstrates consistency with the evidence that the complainant gives at the trial. It is termed recent complaint evidence. The rationale behind the admissibility of such a complaint was explained by Keith J in **Kumar v The State** [2018] FJSC 30, CAV 17 of 2018 (2 November 2018) at para [13]:

> *"... As is well known, the fact that the victim of sexual abuse complains about it to someone shortly afterwards – recent complaint to use lawyer's shorthand for it – does not amount to corroboration of the victim's account. That is because it does not come from an independent source, and treating it as corroboration would offend the prohibition on relying on previous consistent statements. It is admissible only to the extent that it shows consistency on the part of the complainant. It supports the credibility of the complainant's account because her evidence about what happened to her is consistent with what she was saying at the time or shortly afterwards."*

[16] Ground 2 of the Petitioner's grounds claims that the Court of Appeal erred by upholding the conviction thereby failing to order a retrial as a result of the observations of Prematilaka JA at paragraphs 14 and 15 of his concurring judgment. Although the observations by one of the three judges sitting to hear the appeal identified some shortcomings in the summing up, it must be noted that the appeal was nevertheless dismissed by the Court. It must be inferred that the Court of Appeal concluded that the shortcomings did not constitute a miscarriage of justice sufficient to require the Court to allow the appeal. For a re-trial to be ordered under section 23 of the Court of Appeal Act 1949 there must first be a conclusion by the Court that any shortcoming, deficiency or error in the summing up

justifies a conclusion that there has been a miscarriage of justice which in turn constitutes a substantial miscarriage of justice and then only if the interests of justice so require a new trial. Since the appeal was dismissed the issue of a new trial did not arise. I agree that the identified shortcomings in the summing up did not constitute a miscarriage of justice. The learned trial Judge had stated in his judgment that he accepted the complainant's evidence as being truthful in preference to the Petitioner's evidence which he regarded as evasive. The complainant's evidence established beyond reasonable doubt that the Petitioner had sexual intercourse without her consent.

[17] Ground 3 of the Petitioner's ground queries whether the Court of Appeal correctly approached its task when considering whether the trial Judge erred when allowing the assessors to look at the evidence and decide who was telling the truth on the matter of consent. He claimed that this resulted in a miscarriage of justice. I am satisfied that this ground is misdirected. It appears to assume that the trial judge was directing the assessors to base their opinions on the issue of who was telling the truth. However, that is clearly not what the Judge was directing when the summing up is read as a whole. The assessors were directed that they must be satisfied beyond reasonable doubt as to the Petitioner's guilt. That direction required a consideration of all the evidence adduced at the trial and an assessment as to the weight to be attached to the evidence called by both the State and the Petitioner. When read in its totality the summing up does not in any way dilute the obligation of the assessors to be satisfied beyond reasonable doubt as to the guilt of the Petitioner.

[18] The Petitioner's ground 4 claims that the Court of Appeal erred in law by failing to make an independent assessment on the evidence before affirming the verdict of the High Court which was "unsafe, unsupported and insecure" giving rise to a substantial miscarriage of justice. This ground is misguided. Whether a verdict is unsafe and insecure are not grounds upon which the Court of Appeal may allow an appeal against conviction. Under section 23(1)(a) of the Court of Appeal Act the Court shall allow an appeal against conviction if the verdict should be set aside on the grounds that it is (a) unreasonable or (b) cannot be supported by the evidence or (c) that the judgment of the Court should be set aside because of a wrong decision of law or (d) on any ground there was a miscarriage of justice. On the

question of the verdict being unsupported there was evidence adduced at the trial that if accepted by the assessors and the trial Judge was sufficient to establish guilt beyond reasonable doubt.

[19] Ground 5 of the Petitioner's grounds states that;

> *"The Court of Appeal erred at paragraph 15 of the judgment in accepting a reasonable doubt which existed on the complainant evidence to establish guilt to requisite standard of proof thereby failing to give benefit of a doubt to the accused resulting in substantial miscarriage of justice."*

It must be noted that in paragraph 15 of the concurring judgment of Prematilaka JA there is no reference to the acceptance of a reasonable doubt. In paragraph 15 the learned Judge goes no further than to observe that there should have been further directions on certain aspects of the evidence with further analysis of the cases for the parties. It must also be noted that in paragraphs 40 and 42 the concurring Judge has concluded that on the evidence it was open to the assessors and the Judge to be satisfied beyond reasonable doubt that the Petitioner was guilty. The Judge concluded that the guilty verdict could not be set aside on the basis that it was unreasonable or that it could not be supported having regard to the evidence.

[20] Unfortunately in paragraph 42 of his concurring Judgment Prematilaka JA has equated a trial by Judge sitting with assessors with a trial by Judge and jury. The assessors do not convict an accused rather they individually return opinions of guilty or not guilty with which the trial Judge may either agree or disagree. The final decision as to whether an accused is to be convicted or acquitted is a matter entirely for the trial Judge.

[21] Ground 6 of the Petitioner's ground was ground 1 in the Notice of Appeal in the Court of Appeal. The Court of Appeal noted that the Petitioner's defence was that the four instances of sexual intercourse were consensual. The summing up at paragraphs 18-20 dealt with the claim that the sex was accompanied by an affectionate relationship. The fact that the Petitioner disputed the evidence given by the complainant about peripheral issues such as papers and text books, does not mean that the complainant's evidence was fabricated. The assessors heard the evidence of both witnesses. The summing up cannot be expected to

reproduce the detail that appears on the pages of the Record to which the Petitioner refers. Certainly the Court of Appeal was not provided with the particulars that appeared in ground 6 of the Petitioner's submissions in this Court. To a certain extent this ground raises a similar issue to that raised in ground 3.

[22] Ground 7 of the Petitioner's grounds is also misguided. Pursuant to section 237 of the Criminal Procedure Act 2009 the Trial Judge is not bound by the opinions of the assessors or a majority of the assessors. He may agree or he may disagree with the unanimous or with the majority opinions. If the trial judge disagrees with the unanimous or majority opinions then he is required to give written cogent reasons for doing so in a written judgment that must be pronounced in open Court. However when the trial judge agrees with the unanimous or majority opinions it is not necessary for any judgment to be given other than the decision of the Court which must be written. In the present case the trial Judge agreed with the unanimous opinions of the assessors. He delivered a brief judgment setting out the decision of the Court with a brief explanation of the reasons for doing so. There has been no failure to comply with the requirements of section 237 of the Criminal Procedure Act.

[23] Ground 8 of the Petitioner's grounds asserts that the learned trial judge erred in admitting the photographs of the naked complainant into evidence. In order for evidence to be admitted it must be relevant to the issues in dispute between the parties. However not all relevant evidence is admissible. There are certain categories of relevant evidence that may or must be excluded. In the present case the principal issue in dispute was consent. The photos of the complainant sitting naked in the Petitioner's residence were relevant to the issue of consent since it was alleged that the Petitioner threatened to go public with the photos if the complainant did not return to have sex intercourse with the Petitioner.

[24] Ground 9 challenges the observations of the Court of Appeal in relation to the Petitioner's Counsel failing to seek a re-direction by the trial Judge to the Assessors on the issue of consent with particular reference to the complainant's state of mind. At the outset it must be noted that the Petitioner was represented by Counsel at the trial. Furthermore the Court Record of the High Court proceedings at page 310 indicates that both Counsel for the Petitioner and Counsel for the Respondent were asked by the Court on 26 August 2015

after the summing up had been delivered whether any re-redirection was required. Both Counsel indicated "NIL".

[25] In **Tuwai v. The State** [20016] FJSC 35; CAV 13 of 2019 (26 August 2016) and in **Alfraz v. The State** [2018] FJSC 17; CAV 9 of 2018 (30 August 2018) this Court has been reluctant to consider a ground of appeal in the petition that was not pursued at the trial when Counsel did not seek a re-direction of the very point that is the subject of the ground of appeal in the Petition. As consent was the only issue in dispute in relation to the elements of the offence of rape the alleged inadequacy of the directions in the summing up ought to have been paramount in the mind of counsel and ought to have been raised when invited by the trial Judge to do so. There are no cogent reasons put forward by the Petitioner that would justify this Court overlooking or disregarding counsel's failure of the trial.

[26] In any event the directions given by the learned trial Judge in his summing up at paragraphs 11 and 12 on the element of consent are in accordance with the provisions of section 206 (1) and (2) of the Crimes Act 2009. Consent must be freely and voluntarily given. Submission without physical resistance does not alone constitute consent. Consent is not freely or voluntarily given if it is obtained by threat of intimidation.

[27] Ground 10 of the Petitioner's grounds asserts that it was wrong for the learned trial Judge to have concluded that the State had established a *prima facie* case. It must be noted that this ground was not raised before the Court of Appeal. It is a new ground and as such is not ordinarily considered by this Court. However it is not necessary to give the ground any further consideration as the learned judge did not use those words. At page 306 of the Record the Judge simply agreed with the defence counsel's concession that there was a case to answer.

[28] Ground 11 of the Petitioner's grounds of appeal asserts that the Court of Appeal had failed to correctly conclude that the prosecution had not proved the mental element of the offence of rape. This is a more specific claim than the issue raised by ground 5. However at paragraph 13 of the summing up the learned trial judge has explained to the assessors that the prosecution must establish beyond reasonable doubt that the Petitioner knew the

complainant was not consenting to sex at the time. There was ample evidence given by the complainant at the trial to demonstrate that the petitioner by his actions on the first occasion (such as placing his hand over her mouth) knew that the complainant was not consenting to sex.

[29] Ground 12 raises the issue of the trial Judge's failure to direct the assessors on inconsistencies arising from the evidence of prosecution witnesses. To some extent this ground ignores the reality of trial evidence. There will always be inconsistencies in evidence given by witnesses appearing for both the prosecution and the defence. It would raise serious doubts if the evidence was identical. Minor inconsistencies are inevitable. Memories fade. If the inconsistencies are of a nature that may affect credibility and or reliability then they would need to be addressed. On the other hand if the trial judge forms the view that they are relatively insignificant and due to the passage of time then the inconsistencies need to be taken no further. The fact that the Prosecution evidence may have been inconsistent on minor detail was a matter for the assessors in determining whether the Prosecution had established the case beyond reasonable doubt. The learned Judge had adequately explained this to the assessors.

[30] Ground 13 raises the issue of incompetent Counsel. The alleged incompetence relates to the failure of Petitioner's counsel to seek re-directions on evidence to which the learned trial judge had not referred in his summing up. The allegation is that re-directions should have been requested on the evidence summarised given in paragraph 28 of the summing up. The Petitioner relies on paragraph 81 of the Court of Appeal's judgment to demonstrate that he has been disadvantaged by that failure on the part of his trial counsel. However the ground cannot succeed in the absence of cogent reasons. A claim of being disadvantaged is not by itself sufficiently cogent.

[31] This is a new ground that was not considered by the Court of Appeal and was therefore not considered by the Court of Appeal. There is therefore a jurisdictional obstacle facing the Petitioner. It is then submitted by the Respondent that the ground does not raise an issue that falls within section 7(2) of Supreme Court Act 1998. A further problem for the

Petitioner concerns the procedure that is now required to be followed when there is a ground of appeal relating to the competency of former trial Counsel. The procedure is discussed in some detail by the Court of Appeal in its judgment in **Chand v. The State** [2019] FJCA 254; AAU 78 of 2013 (28 November 2019).

[32] The last ground of appeal, ground 15, is the appeal against sentence. As noted earlier the Petitioner was sentenced to 14 years imprisonment in respect of each of 4 convictions for rape. Applying the totality principle the learned Judge ordered that the sentences be served concurrently which meant that the Petitioner was sentenced to 14 years imprisonment with a non-parole term of 12 years. In arriving at the head sentence of 14 years in respect of each conviction the learned Judge had adopted the accepted procedure for sentencing in Fiji. This involves proceeding in stages until a final head sentence has been calculated. In the present case the Judge selected 12 years as the starting point. In doing so he was mindful that the maximum sentence for rape is life imprisonment. The current range of sentences for rape of an adult was correctly identified as 7 – 15 years. It must be conceded that in selecting 12 years as the starting point the learned Judge has not indicated what factors he had been considered in selecting a starting point that was certainly at the higher end of the tariff. A further three years was then added for aggravating factors and the reasons for doing so are stated in the judgment. One year was then deducted for time served on remand.

[33] In its judgment the Court of Appeal noted that the trial judge had exercised his sentencing discretion in accordance with the stipulated approach to sentencing described by the Court of Appeal in an earlier decision of **Naikelekelevesi v. The State** [2008] FJCA 11; AAU61 of 2007 (27 June 2008). The Court of Appeal correctly noted the bases upon which the exercise of a sentencing discretion may be challenged. The Court of Appeal concluded that the ground was devoid of merit and by inference should have concluded that there was no error in the exercise of the sentencing discretion.

[34] The structured approach is intended to ensure, as far as possible, that a sentencing judge has considered all the relevant faults and has not taken into account any relevant factors. However, without clear reasons being provided by a sentencing judge it is not always

possible to determine whether the discretion has miscarried. For example when a Judge has selected a starting point that falls at the higher end of the tariff reasons should be given and those reasons should relate to the circumstances of the offence. On the other hand when identifying any aggravating factors they should relate more to the offender. On occasions the distinction can be blurred and so as to ensure that the same factors are not considered as both relevant to the selection of a starting point and considered as aggravating factors reasons should be given in both cases. The Court of Appeal did not consider this aspect of the Petitioner's complaint.

[35] However the real issue is whether the head sentence of 14 years in respect of each conviction amounts to a miscarriage of the sentencing discretion. The Petitioner has not indicated what his sentence should be. Clearly the totality principle needed to be applied here as it would be unacceptable to have ordered four consecutive sentences of 14 years. But on the other hand the Petitioner could not reasonably have expected to receive a total sentence for four convictions of rape that resembled a sentence for one conviction of rape.

[36] It follows that regardless of what approach a sentencing judge adopts in the exercise of the discretion, one final step should always be taken. That step is to take one pace back and assess the proposed sentence and ask whether that sentence is consistent with the accepted sentencing principles and meets current community expectations for punishing an offender who in this case has raped an 18 years old girl on four separate occasions as a result of deceit and threats.

[37] In this case I am satisfied that the learned Judge should have provided some basis for selecting the higher starting point. On the other hand I am also satisfied that for the reasons stated the sentence imposed for the four convictions of rape does not indicate that the sentencing discretion has miscarried.

[38] In this petition, it is appropriate to briefly comment on the matter of the petitioner's prior criminal history. In April 2014 he was convicted at the Labasa Magistrates Court for "General Dishonesty" and fined $25.00 with an order to pay $25.00 as compensation to the complainant. In October of the same year he was convicted again at the Labasa Magistrates Court for "Traffic in Obscene Publication" and sentenced to 9 months imprisonment.

[39] The learned Judge did not expressly refer to these matters but in keeping with the structured approach to sentencing he had considered the prior history when he found that there were no mitigating factors working in favour of the Petitioner. There was no deduction for being a person of good character.

[40] It is apparent that a trial Judge sentencing an offender in Fiji is required to consider prior convictions if the convictions require a determination that the offender is "a habitual offender" under Part III (Sections 10-14) of the Sentencing and Penalties Act 2009. One of the consequences of such a determination by a sentencing judge is the requirement to impose consecutive sentences rather than concurrent sentences. It is apparent that the learned Judge did not regard the 2014 offences as justifying a determination that the petitioner was "a habitual offender" since he had ordered the sentences to be served concurrently. I cannot fault that conclusion.

Conclusion

[41] For the reasons outlined above I have concluded that none of the grounds of appeal in the Petition satisfy the jurisdictional threshold in section 7(2) of the Supreme Court Act. In particular none of the grounds would constitute a grave and substantial miscarriage of justice on account of leave not being granted. As a result I would refuse leave to appeal on all 14 grounds.

Goddard J

[42] I concur with this judgment in every respect.

Mataitoga J

[43] I have read the judgment of Calanchini J in draft. I agree with reasons and conclusion reached therein.

Order

Leave to appeal against conviction and sentence is refused.

The Hon. Mr. Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon. Madam Justice Dame L. Goddard
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT