IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0001 OF 2022
[On Appeal from the Court of Appeal No: AAU0107/16]

BETWEEN **JOSEPH SHYAM NARAYAN**

Petitioner

THE STATE

Respondent

Coram The Hon. Acting Chief Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Ms L. Manulevu for the Petitioner
Ms R. Uce for the Respondent

Date of Hearing: 3rd October, 2023

Date of Judgment: 26th October, 2023

JUDGMENT

Temo, AP

[1] I have read the draft judgment of His Lordship Mr Justice A. Qetaki. I entirely agree with His Lordship's judgment and proposed orders.

Arnold, J

[2] I have read the judgment of Qetaki J in draft and agree with the orders he proposes, for the reasons he gives.

Qetaki, J

Introduction

[3] The petitioner was indicted in the High Court in Suva on one count of Sexual Assault contrary to section 210(1)(a) and one count of Rape contrary to section 207(1) and (2) of the Crimes Act 2009. After the trial in the High Court the assessors retuned a unanimous opinion of guilty of the charges. On 18th July 2016, the learned trial Judge agreed with the unanimous opinion of the assessors and convicted the petitioner on both counts.

[4] In count one, the petitioner was alleged to have unlawfully and indecently assaulted SS by touching her vagina, between 1st and 28th of February 2013 at Nasinu in the Central Division. On the second count, it was alleged that on 11th of March 2013 at Nasinu in the Central Division the petitioner penetrated the vagina of SS with his tongue without her consent.

[5] The learned trial Judge sentenced the petitioner on 25th July 2016, to imprisonment for a term of 10 years, 10 months and 18 days with a non-parole period of 8 years, 10 months and 18 days.

[6] Aggrieved by the conviction and sentence, the petitioner, on 19 August 2016, filed a timely application for leave to appeal to the Court of Appeal in line with section 21(1) of the Court of Appeal Act against his conviction and sentence. On 16th June 2017, a single Judge of the Court of Appeal in his Ruling refused the application for leave to appeal against conviction but allowed the application for leave against sentence.

[7] The petitioner did not renew his application for leave to appeal against conviction before the Full Court of Appeal. However, an application for renewal for leave to appeal his

sentence was pursued based on two grounds. On 29th of November 2018, the Full Court refused the petitioner's application for leave against sentence, and, by a majority decision enhanced the petitioner's sentence to 14 years imprisonment with a non-parole period of 11 years. The enhancement of the sentence was not appealed.

[8] Instead, the petitioner, sought renewal and enlargement of time to appeal against the conviction dated 18th July 2016, after more than 6 years from the date of conviction; and after two years from the date of the learned single Judge's Ruling disallowing leave to appeal against the conviction.

[9] In a judgment dated 24th of November 2022, the Full Court dismissed the renewal application for enlargement of time for leave to appeal the conviction, and affirmed the conviction of the petitioner on counts 1 and 2.

[10] Aggrieved by the decision of the Court of Appeal with regard to his conviction and sentence, on 25th January 2022 and 13th January 2023, the petitioner filed two notices seeking special leave to appeal the decisions of the Full Court of Appeal pursuant to section 7(2) of the Supreme Court Act.

[11] On 28th September 2023, the petitioner, through his Counsel filed a notice of motion pursuant to section 14 of the Supreme Court Act and Rule 17(4) of the Supreme Court Rules 2016 for enlargement of time to appeal.

[12] At the hearing of the petition on 9th October 2023, Counsel for the petitioner indicated the petitioner is withdrawing his appeal against sentence.

The Law

[13] **Jurisdiction of the Supreme Court with respect to grant of leave to appeal.**
Section 98 (3), (4) and (5) of the Constitution state:

"(3). The Supreme Court-……..(b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal ...

(4) An appeal may not be brought to the Supreme Court from a final judgment 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".

[14] Section 7(1) of the Supreme Court Act, requires the Court to have regard to the circumstances of a case when exercising its jurisdiction, with respect to appeals in any civil or criminal matter, and it may- -

"(a) refuse to grant leave to appeal;

(b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or

(c) grant leave and allow the appeal and make such other orders as the circumstances of the case require."

[15] For a criminal matter, section 7(2) of the Supreme Court Act, requires that, the Supreme Court must not grant 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;

(c) substantial and grave injustice may otherwise occur."

[16] **Powers of the Supreme Court generally.**

Section 14 of the Supreme Court Act, states:

"14. For the purposes of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal and that power and authority may be exercised, with such modifications as are necessary according to the circumstances of the case.

[17] There have been pronouncements made in Fiji and other jurisdictions on, what might constitute, the occurrence of substantial and grave injustice. A guide for the grant of special leave was set by this Court in the case of Livai Lila Matalulu & Another v The Director of Public Prosecutions [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003). This Court held that:

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal is reviewed. The requirements of 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 appellant body by burdening it with appeals that do not raise matters of general importance of principles or in the criminal jurisdiction, substantial and grave injustice."*

[18] A rather similar provision to section 7(2) of the Supreme Court Act exists in section 32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap 484, as follows:

"Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the High Court, as the case may be, that a point of law of great importance is involved in the decision or it is shown that substantial and grave injustice has been done."

[19] The provision is said to have originated from the decision of the Privy Council in **Re Dillet** (1887) 12 App CAS 459. Mr Dillet was a legal practitioner from British Honduras who challenged his conviction for perjury and a consequential order striking him off the role of practitioners: see also the case So Yiu Fung v Hong Kong Special Administrative Region [1992] 2 HKCFAR 539; [2000] 1 HKLRD 179.Delivering the Privy Council's advice, Lord Watson said (at page 467) that:

"………….the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of principles of natural justice, or otherwise, substantial and grave injustice has been done."

[20] In **So Yiu Fung** (supra) the appellant, a man aged 22 was tried in the High Court on two counts of rape. He was at the time a man of good character, the jury returned their verdict

on count 1 they convicted the appellant (by a majority of 5 to 2) of alternative offence of attempted rape. On the 2nd count they convicted him (by a majority of 6 to 1) of rape as charged. The appellant received a 7 years term of imprisonment. Appellant appealed to the Court of Appeal seeking the quashing of his conviction. His conviction was affirmed by the Court of Appeal. He further appealed to the Court of Final Appeal of the Hong Kong Administrative Region , where the leave to appeal was granted by the Appeal Committee, on the basis that it had shown that it was at least reasonably arguable that substantial and grave injustice had been done. Mr Justice Bokhary PJ, (Permanent Judge of the Court) made the following important comments, at pages 3-4 of the judgment:

"In common with the systems of criminal justice for which tribunals like the House of Lords and Privy Council have ultimate judicial responsibility, our system of criminal justice aims to be careful and speedy at the same time. It is geared to that objective. Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. If the matter proceeds further to this court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought under the "substantive grave injustice" limb to succeed it must be shown that there has been to the appellant's disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice."

[21] The Petitioner has to establish that his/her request comes within the ambit of section 7(2)(c) of the Supreme Court Act. This Court had explained the underlying rationale for the stringent test in order for the Court to grant special leave in **Livai Lila Matalulu** (supra).

[22] The Court of Appeal of Hong Kong Special Administrative Region had taken the matter further in a fairly recent decision in **Kosar Mahmood v HKSAR** FAMC No.31 of 2012 (unreported) where the Court having adopted the principles stated in **So Yiu Fung** (see paragraph [20] above, added:

"6. *We wish to stress that in all future applications on the substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norm; and why such departure is so seriously wrong that justice demands a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below.*

7. *If the application for leave to appeal does not provide reasonably arguable basis for such submissions, it may expect to be dismissed summarily…."*

[23] Having discussed the applicable laws, I now turn to consider the petitioner's application seeking enlargement of time to appeal, and also address the question: whether the petitioner has met the test under statute and case law. For the latter, it is necessary to consider all the circumstances of the case, including grounds of appeal, the final judgment of the Court of Appeal, and the law.

Application Seeking Enlargement of Time

[24] A notice of motion seeking enlargement of time, with an affidavit in support were filed on filed on 28 September 2023. At paragraph 3 of the affidavit the petitioner stated, he had not pleaded guilty to the two counts of which he was charged, and was convicted on both counts and sentenced to 10 years, 10 months and 18 days imprisonment with a non-parole period of 8 years, 10 months and 18 days At paragraph 4, the petitioner stated, his appeal against conviction was heard on 1 November 2022 and judgment was delivered on 24 November 2022. On the cause of delay, he stated, he gave his grounds and submissions to the Corrections Center well before the 13th day of January 2023. In consideration of the affidavit and circumstances of the case I grant the application for enlargement of time, as the delay is one day only. The petitioner's grounds for leave to appeal can now be considered.

[25] The facts are serious and are reproduced below, obtained from the summary of Judgment of the High Court at paragraphs [14] to [18]:

"[14] The victim-girl who shall be referred to as SS, was 17 years and 6 days old by March 2013. SS was a student in form 6, who was also holding the position of Deputy Head Girl of a school in her locality of residence. She has come to live with her mother in 2011, who, by then, was in a de facto relationship with the appellant.

[15] The mother of SS was running a bean cart little away from the residence and used to be at work from early morning till the evening. The appellant then 37 years of age, was a taxi driver, who used to take SS to and from school on some days. It so happened that the appellant used to spend the afternoon at home after SS returns from school.

[16] The evidence of SS was that the appellant used to pass comments on SS as she started living with them and prevailed upon her not to call her 'father'. The comments passed on SS were alluring which made SS quite uncomfortable but she kept offering him a fatherly respect. The appellant's alluring conduct, according to the evidence of SS had not, however, changed.

[17] It was the evidence of SS that she used to smoke to relieve herself of stress. On a date in February 2013, while she was smoking in the bathroom being naked for a shower, the appellant opened the door and touched her vagina to which she did not consent. The appellant told SS to keep the conduct of appellant a secret and that he would keep her smoking a secret. SS did not disclose the incident to anyone as she had felt scared.

[18] On 11 March 2013, the appellant brought Marijuana and wanted SS to smoke it after she returned from school. As SS refused to take any puff of Marijuana, the appellant forced her to smoke without leaving the puff out. The appellant also remarked that he had wanted to suck SS's vagina, after touching and kissing her. The appellant insisted that SS should go to the bathroom and wash herself. As SS washed herself, the appellant came inside the bathroom and took her inside the bedroom where he made SS lie on the bed with her feet on the floor. The appellant, thereupon knelt-down on his knees, lifted SS's legs, licked the vagina and inserted his tongue into her vagina –as stated at pages 297-311 of the Record."

Discussion

(A) Ground of Appeal Against Conviction

[26] The Court will deal with the only ground of appeal against conviction.

<u>Ground 1</u>:

"That the learned appellate judges erred in law and fact by accepting the learned trial Judges Summing Up to Assessors by not properly considering and responding to the 2nd ground submitted by Petitioner's counsel, which created a great miscarriage of justice in law. "

This ground appears to suggest that the Court of Appeal did not independently assess and consider the evidence establishing the date of offending in the rape charge, or did not directly address the ground, but, simply accepted the Summing Up by the learned trial Judge. That the Court did not look into the appellant's complaint that the learned trial Judge was incorrect in convicting the appellant for rape, as the date of offending was not established by evidence. This caused a miscarriage of justice. The 2nd ground referred to in <u>Ground 1</u> above, is in brackets herein: ***<u>["Ground 2:</u> That the learned trial judge erred in law and in fact when convicted the appellant with the State's case not fully and properly made out against the Appellant with regards to the date of offending for count of Rape thus making the conviction unsafe and causing a grave miscarriage of justice."].***

<u>(B) Petitioner's Submissions</u>

[27] The petitioner's submissions, both written and oral, relate to the alleged uncertainty of evidence surrounding the **date of offending.** These submissions may be summerised as follows:

(i) The line of evidence of PW 1 on the date of the rape as alleged in the second count occurred, was doubtful.

(ii) The Court allowed PW 1's memory to be refreshed by State Counsel while giving evidence during the trial .However, PW 1 was still not able to state in her evidence that the incident in count two occurred on 11 March 2013, the date in the information. That is the date to which the petitioner pleaded, and the date which the assessors relied upon-page 306-308 of volume 2 Court Records.

(iii) The date in which the allegations in the second count occurred was doubtful.PW 1 did not state that it occurred on 11 march 2013.She did state that it happened "the

next day". As such the date of the alleged offending was doubtful-see page 308 of Volume 11 of Court Records.

(iv) PW 1 was unsure in parts of her evidence when posed with questions on dates of the incidences. She was unsure and ambiguous on the specific time frames of offending always introducing her answers with "I suppose". Her evidence was doubtful and should not be relied upon.

(v) In the context of PW 1's evidence on dates being accepted by the learned trial judge, the adversarial criminal justice system requires that evidence adduced in a trial is fairly and properly put before the Court.

(vi) Paragraphs 62-64 of the Learned Trial Judge's Summing Up is relevant to the petition, where it is clear that the learned trial judge knew that the specific date , that is 11/03/2013 as per the information was not adduced from the complainant. The complainant in her evidence stated that the alleged rape transpired the date after 11/03/2013 so we can assume the alleged rape took place on 12/03/2013.However, at the close of the Prosecution case there were no applications made by the State Counsel to amend the information to reflect the same. In the circumstances, the defence of alibi raised by the petitioner during trial was for 11/03/2013.It is unfair on the petitioner to prepare a defence for 11/03/2013 when the complainant informs the Court that it is 12/03/2013.

(vii) That sections 58 and 61 of the Criminal Procedure Act outlines the drafting of the contents of a charge or information, and has to be complied with. In support the case **Nausara v State** [2023] FJCA 135; AAU108.2018 (27 July 2023) involved an issue which is similar to this where the date of the offence on the information was incorrect, and the Court of Appeal stressed the importance of complying with section 58 of the Criminal Procedure Act in terms of the information contained in the charge.

(viii) That **Nausara** (supra), at paragraphs 29-37, also discussed the essential element of an information being the date and the defect if the date was wrong. The Court of Appeal concluded that there was a miscarriage of justice, it ordered that conviction be set aside and a retrial be conducted.

(ix) The Prosecution did not amend the information, specifically the date of commission of the alleged rape, which disadvantaged the Petitioner in his defence. He also relied on the case **Hackwill v Kay** [1960] VicRp 98; [1960] VR 632on the effect of Prosecution not amending the information.

[28] The petitioner concluded by submitting that the State was not relieved from the burden of proving the elements of rape beyond a reasonable doubt to safely convict the Petitioner for the offence of rape. It further submitted that it was erroneous in fact and law to convict

the petitioner, because the conviction was unreasonable, since it could not be supported by evidence, beyond reasonable doubt, that the petitioner had raped the complainant, on 11/03/2013, in accordance with the information he was charged with.

(C) Respondent's Submissions

[29] The respondent tendered its written submissions (in response) at the hearing on 9 October 2023, and also made oral submissions .The submissions (both written and oral), are summerised below:

(a) That issues pertaining to the date of the alleged offence in count 2 of the information was addressed by the learned trial judge in the Summing Up from paragraphs 66 to 68.

(b) The learned trial judge also addressed the issue pertaining to the date of the alleged offence in count 2 of the information in paragraphs 10 to 12 of his judgment.

(c) It is clear that the learned trial judge was aware of the issues pertaining to the date of the alleged offence in respect of the second count, and he noted that the petitioner was not prejudiced since he was aware of the information pertaining to the allegation in respect of the second count of rape as per the information. The learned trial judge also noted that the petitioner claims to not have been at home at the time the offence was alleged to have been committed. However, the petitioner and his witnesses who gave evidence on his alibi did not testify on what exactly took place on 11 March 2013, as their evidence was about the petitioner's daily routine as a taxi driver in general.

(d) The issue pertaining to the date of the alleged offence in respect of count two was raised by the petitioner in his leave to appeal before a single judge ,The single judge in his Ruling dated 16 June 2017 shared the same view –see paragraphs 12 to 15 of the Ruling dated 16 June 2017.

(e) It is important to note that, in its judgment dated 24 November 2022 the full Court of Appeal had addressed both grounds of appeal against conviction (ground 1)pertaining to the issue of identification , and the date of the alleged offence (ground 2) in respect of the second count of rape. In paragraph 32 of the judgment the Court of Appeal held:

"Considering the facts, as set - out above, and the forgoing judicial precedents I am of the view that the learned trial judge had adequately considered the matters of identity and the dates of offending and rightly summed-up the case to the assessors to deliberate and rule on the issue of

guilt or otherwise of the appellant. In pronouncing the judgment, the learned judge directed himself with his directions on the questions of law and the facts, as he ought to have, in the discharge of his functions as a judge having overall control of the trial."

(f) The issue pertaining to the second grounds of appeal against conviction was adequately addressed by the learned trial judge in the Summing Up and Judgment, and was also adequately addressed by the learned single judge at the leave stage, and by the full Court of Appeal. It was submitted that the Petitioner was not prejudiced by the incorrect date of the allegation pertaining to the second count of rape as per the information. On this basis, there is no substantial miscarriage of justice and special leave to appeal the conviction should be dismissed.

Conclusions

[30] The focus of the petitioner's challenge is the Court of Appeal's alleged acceptance of the Summing Up of the learned trial Judge without carrying out an independent assessment of the merits of the complaint contained in Ground 2 of the application for leave to appeal before the Court of Appeal. That it resulted in grave miscarriage of justice. Counsel for the petitioner argued that the complainant, PW 1, was mistaken as to the date of when the rape complained of in the 2nd count, occurred. It is alleged that the complainant was in doubt, and even after a moment of memory refreshment, she was still not able to correctly state the day the rape occurred, that is 11/03/2021. The complainant even stated that it occurred on the next day which is the 12 March 2021. Counsel submitted that the date of the rape or offending is an important element of the offence which has to be proved by the prosecution beyond reasonable doubt- evidence suggests, it did not. Also, given the evidence and the circumstances, the respondent ought to have amended the information, in line with the petitioner's right to a fair trial.

[31] I observed when reading the Summing Up on this aspect, that the learned trial judge had given proper and adequate directions in connection with the date on which the offending occurred as in the information for the second count. That, the petitioner's concerns and questions were addressed in paragraphs 66, 67 and 68 of the Summing Up. No re-directions was sought by the petitioner at the trial. The trier of facts had returned a unanimous opinion of guilty which was accepted by the learned trial judge. All other

conceivable effects of a mistaken or incorrect date on the date of the rape that took place in the second count have, in my view, all been covered and adequately addressed in the following paragraphs:

> *"66. According to the prosecution, the accused penetrated the complainant's vagina with his tongue. Second count alleges that this incident took place on 11/03/13.However, the complainant did not come out with the exact date of the incident. In her evidence she related to an incident which the prosecution has not charged the accused for as an incident which took place on 11/03/13.According to the complainant, the incident where the accused licked her vagina took place on the following day. This was the last incident before she went to her form teacher seeking his assistance. Her version was that, from the date the accused caught her smoking, he was taking advantage of her threatening her that he will disclose about her smoking. Would the fact that she did not come out with the date mentioned in the second count mean that the complainant lied about the incident relevant to the seconds count?*
>
> *67. Another question to be considered is, did the accused know the allegation he had to defend in respect of the second count. The crux of the allegation in the second count is that the accused penetrated the complainant's vagina with his tongue. When the complainant's version regarding the allegation was put to the accused, he denied and he said that he was not at home and he was doing his job. In relation to this count you may therefore also consider whether the accused was prejudiced in anyway due to the fact that the complainant did not come out with the date mentioned in the count. Did the accused's evidence of alibi focus merely on 11/03/2013 or was it about his daily routine as taxi driver*
>
> *68. Considering all the evidence led in this case, if you are satisfied that the prosecution has proved beyond reasonable doubt that the accused penetrated the vagina of the complainant with his tongue, then you should find the accused guilty of the second count. If you have a reasonable doubt, or you think that the variance between the date mentioned in the charge and the complainant's evidence regarding the date of offence caused a prejudice to the accused in respect of the defence, then you should find him not guilty of the second count."*

[32] The learned trial judge, was satisfied that the prosecution had proven its case beyond reasonable doubt-see paragraphs 10 and 11 of his judgment. He did not find the complainant's evidence of the incident alleged in the second count unreliable, simply because she did not come up with the exact date; also that there was no prejudice caused

to the appellant in defending the second count due to the variance in the date in the information and that adduced in evidence. He stated:

> *" 10. I accept the evidence of the complainant that the accused penetrated her vagina with his tongue on or about 11th March 2013.According to the complainant, this incident took place on the day after the 11th march 2013.She recalled another incident which the accused is not charged for which took place on 11th March. Her evidence was since the day the accused caught her smoking she was subjected to various sexual assaults by the accused. Considering the circumstances, I do not find the complainant's evidence of the incident relevant to the second count unreliably simply because she did not come out with the exact date mentioned in the second count.*
>
> *11. However, I considered it necessary to examine whether this caused any prejudice to the accused in his defence. The crux of the allegation pertaining to the second count is that the accused penetrated the complainant's vagina with his tongue. The accused knew that this is the allegation he is required to defend in respect of the second count. His defence was that he was not there at home at the time of the offence was alleged to have been committed. The accused or his witness who gave evidence on his alibi did not testify on what exactly took place on 11/03/13 based on any proper record. The evidence was about the accused's daily routine as a taxi driver in general. After considering all relevant circumstances, I find that there was no prejudice caused to the accused in defending the charge in the second count due to the variance between the evidence and the particulars in the second count with regard to the date of the offence."*

[33] Having considered the judgment of the Court of Appeal, I am convinced that the petitioner's ground of appeal is misconceived, for the following reasons:

(a) The petitioner did not appreciate that in its judgment, the Court of Appeal had firstly dealt with the petitioner's application for renewal and enlargement of time to appeal against the petitioner's conviction dated 18 July 2016.This application, for the reasons stated in the judgment, was dismissed: See paragraphs [9] to[12] and paragraph[34] of judgment..

(b) Secondly, the judgment considered the evidence led before the trial judge in order to consider whether the two grounds urged in support of the renewal application for leave to appeal bear merit in light of the legal position, discussed in relation to (a) above. Such consideration appear in paragraphs [13] to [30] of the judgment.

(c) Thirdly, the judgment dealt with how the learned trial judge dealt with the issues of fact, including that of the appellant's identity (Ground 1), and the dates of offending (Ground 2). The Court of Appeal considered these in paragraphs [31] and [32] of its judgment. In paragraph [31] of its judgment, the Court cited paragraph 68 of the Summing Up which paragraph is (also) quoted in paragraph [32] above.

(d) Further the Court of Appeal , in paragraph [32] of its judgment, stated:

> *"[32] Considering the facts as set-out above, and the foregoing judicial precedents, I am of the view that the learned trial judge had adequately considered the matters of identity and the dates of offending and rightly summed-up the case to the assessors to deliberate and rule on the issue of guilt or otherwise of the appellant. In pronouncing the judgment, the learned judge directed himself with his directions on the questions of law and facts, as he ought to have, in the discharge of his functions as a judge having overall control over the trial.*

(e) The Court of Appeal had independently considered, assessed and addressed both the grounds of appeal and concluded that they do not have merit, and dismissed both grounds. The Court states in paragraph [34] of the judgment:

> *"[34] I, therefore hold that there is no merit in the two grounds of appeal for them to be considered as viable grounds to be urged in an appeal against the conviction in this case. I, accordingly reject both grounds of appeal and dismiss the renewal application for enlargement of time to appeal against conviction."*

[34] Counsel for the Petitioner had cited **Nausara v State** (supra), a recent case where issues similar to that raised in this case (incorrect date in the information) occurred, and in which the Court of Appeal emphasized the importance of compliance with section 58 of the Criminal Procedure Act. In the facts and circumstances of that case, the full Court of Appeal concluded that the incorrect information caused a miscarriage of justice, and the conviction was set aside, and a retrial was ordered. In **Nausara,** the facts and circumstances are distinguishable from this case. The case **Hackwill v Kay** [1960] Vic Rp 98; [1960] VR 632 was also submitted by the Petitioner in its argument regarding the incorrect information and the need to amend the charge/information as otherwise the information is defective. This case is also distinguishable from the present case. In any event, the date of offending issue was adequately addressed in the Summing Up and

judgment of the learned trial judge, and which, was also considered by the Court of Appeal when dismissing the petitioner's appeal. I agree with those positions.

[35] I am satisfied that the Court of Appeal did not just act to rubber stamp the learned trial judge's Summing Up in respect to ground 2 of the appeal by the Petitioner. The Court had considered both the grounds of appeal as evident in the judgment.

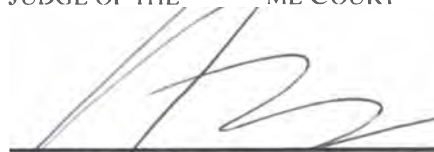
[36] In the circumstances of the case and the totality of the evidence, I hold that no substantial and grave injustice occurred due to the decision. Leave is refused. As I have also covered the merits of the ground of the petition, if leave had been granted, I would have dismissed the appeal, there being no substantial and grave miscarriage of justice occurring. The petitioner's conviction on Counts (1) and (2) are affirmed.

Orders of the Court:

1. *Motion Seeking Enlargement of Time is allowed.*
2. *Application for leave to appeal against conviction on Count 2 is dismissed.*
3. *Appellant's Conviction on Counts (1) and (2) are affirmed.*

The Hon Acting C[illegible]f Justice Salesi Temo
JUDGE OF THE SUP[illegible]ME COURT

The Hon Mr Justice Terence Arnold
JUDGE OF THE [illegible]ME COURT



Hon Mr Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT