# IN THE SUPREME COURT OF FIJI
**AT SUVA**

**CRIMINAL PETITION NO: CAV0005 OF 2022**

**Court of Appeal No. AAU 25 of 2011**

**BETWEEN** **GOVIND SAMI**

***Petitioner***

**THE STATE**

***Respondent***

**Coram** **The Hon. Mr. Justice Anthony Gates**
**Judge of the Supreme Court**

**The Hon. Mr. Justice Brian Keith**
**Judge of the Supreme Court**

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

**Counsel** **Mr. D. Sharma and Ms. G. Fatima for the Petitioner**
**Dr. A. Jack for the Respondent**

**Date of Hearing** **9 October 2023**

**Date of Judgment** **26 October 2023**

# JUDGMENT

**Gates J**

1. I have read in draft the judgment of Keith J. I am in full agreement with its conclusions, reasons, and orders. I add a few observations of my own.

2. The petitioner's new solicitors followed the correct procedure set out in the Court of Appeal decision in **Nilesh Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019), affirmed in the Supreme Court [2022] CAV 1 of 2020; 27 October 2022. They referred the complaint of the petitioner about his trial counsel to that counsel. Trial counsel's comments were presented in evidence before us through an affidavit. Some specific questions in the exchange between counsel, if posed, might have clarified the advice given by trial counsel to his client as to whether the petitioner would be wise to give sworn evidence, and whether counsel had explained the pros and cons of giving or not giving evidence.

3. As Keith J has indicated it is not always an easy matter for counsel to tender advice on this issue. It is a delicate matter for instance, for counsel to have to suggest that his client might not make a credible witness, or that he might conduct himself unfavourably in cross examination. Trial counsel said he considered the defence had made good progress cross examining the complainant and her husband. That opinion is difficult to assess. As things turned out, the defence that was mounted, was unsuccessful. But counsel is not so likely to be blamed for his advice to the petitioner just because the conduct of the case may have proved unsuitable.

4. Courts will be slow to say that a trial has miscarried because of a flawed tactical decision by counsel. In **Vereivalu v State** CAV 5 of 2019; 27 October 2022 the trial was found to have miscarried because of the egregious conflict of interest of defence counsel in defending nine accused. In that case, defence counsel in effect defended only one group within the nine, ignoring the interests of the other group. They had quite different defences to raise. Counsel should never have represented all of the nine. That he did so, and never put the case of one group, or advised that group to give evidence, meant that they had not been defended. The trial suffered a serious miscarriage, and their convictions had to be quashed.

5. This was not the case here. In the instant case, though criticism could be and was levelled against trial counsel, it remains that counsel's efforts simply failed to achieve the result anticipated. But this set of circumstances does not call for the intervention of this court.

**Keith J.**

*Introduction*

6. One of the most important decisions which a defendant has to make in a criminal trial is whether to give evidence. It is a topic on which he will need advice about the advantages and disadvantages of the various options open to him. In this case, the defendant, Govind Sami, decided not to give evidence. He claims that he did not get proper advice about it from his lawyer. That is one of his grounds of appeal. There are a number of others. They were exceptionally well argued by Mr D Sharma, who did not appear for Govind at his trial. He has given us much to think about.

7. Govind was charged with two offences of rape and one of indecently annoying a person. He was tried in the High Court where he pleaded not guilty to all charges. He was convicted on all of them, and sentenced to terms of imprisonment totalling nine years in all, with a non-parole period of eight years. He appealed against his conviction and sentence. A single judge of the Court of Appeal granted him leave to appeal against his conviction on limited grounds, but refused him leave to appeal against sentence. Govind did not pursue his appeal against sentence further. In due course, the Court of Appeal heard his appeal against conviction, but dismissed the appeal. Govind now seeks leave to appeal against his conviction to the Supreme Court.

*A preliminary point*

8. Govind's grounds of appeal focus on where it is alleged the Court of Appeal went wrong. However, in *Lesi v The State* [2018] FJSC 23, the Supreme Court said at para 74 (*per* Keith J):

> " ... much of the petitioners' focus was on the judgment of the Court of Appeal. Their grounds for the most part set out the ways in which they say the Court of Appeal fell into error. That is entirely understandable. After all, they are seeking leave to appeal from the decision of the Court of Appeal. But it should not be forgotten that, although the Supreme Court is a second-tier court, its focus is still on what happened in the trial court – just like the Court of Appeal. It has the advantage, of course, of the

> views of the Court of Appeal on whether things went wrong in the trial court, but what it ultimately is reviewing is the course which the trial took rather than whether the Court of Appeal's analysis of the grounds of appeal was correct."

The Supreme Court said much the same thing in *Abourizk v The State* FJSC 9 at para 8 (*per* Keith J). That explains why this judgment will not be addressing every way in which it is said that the Court of Appeal fell into error or every aspect of its process of reasoning. The focus will be on what happened in Govind's trial.

*The facts*

9. *The charges.* Govind owned a large farm in Raiwaqa near Navua. He was 60 years old at the time. The woman who he was found to have raped lived in a small house on the farm with her husband, who was employed by Govind to look after the farm.[1] She was 27 years old. Govind would visit the farm often and stay at the house sometimes. She claimed that on three occasions Govind had either come to her house or was in the house. The first occasion was on a date in July 2014, and the second was on 25 October 2016. Her evidence was that Govind had forced her to have sexual intercourse with him on each of those two occasions when she had been alone in the house. She claimed that it was his imposing physique and the fact that he was her husband's employer that resulted in her feeling unable to resist him: in effect, she had to submit to his advances. The two charges of rape related to those two occasions. On the first occasion he had come to the house. On the second occasion he had spent most of the day in the house before he had forced himself on her. The third occasion, she said, was four days after the second occasion, ie on 29 October 2016. Her evidence was that on that occasion he was already in the house when she returned to the house after visiting her aunt. He had told her to come inside, unzipped his trousers, taken out his penis and asked her to perform oral sex on him. When she began to cry, he walked off. The charge of indecently annoying a person related to that occasion.

10. *The woman's evidence.* The woman's evidence[2] was that following the first occasion on which Govind had allegedly raped her she had told her husband about it when he

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The High Court took great care not to name the woman. When referring to the charges in his summing-up to the assessors, the judge referred to the woman by her initials only, and referred to her throughout as either the complainant or PW1. It is regrettable that the Court of Appeal did not take a similar course. In para 4 of his judgment, Gamalath JA referred to the woman by name.

[2] The judge's note of her evidence is at pages 335 -344 of the Record of the High Court.

had come home. He had not believed her, she said, and accused her making it up because she did not like living on the farm. She added that she had not reported what had happened to the police as she was scared of them. She claimed that she had told her husband about the second occasion on which Govind had allegedly raped her, though (a) she did not in her evidence say what his reaction had been, (b) it was different from what she was to tell the police which was that she had not told her husband about it, and (c) she was to change her evidence later on when she said that she had not told her husband about this incident because she thought that he would not believe her. Things came to a head after the occasion on which Govind had allegedly exposed himself to her. Her evidence was that she had returned to her aunt's home and had not told anyone there what had happened, but that she had told her husband about it. She went on to say that she had threatened to leave him if he did not help her to report the matter to the police. She later told her sister what had happened – she did not say when – and it was only then that the police were informed.

11. The case put to her in cross-examination[3] was that she and Govind had had sex with each other about ten times. Their intimacy had always been consensual. The woman denied that, and despite a lengthy cross-examination she maintained her account of non-consensual sex on the three occasions to which the charges related. However, three particular topics on which she was cross-examined need to be mentioned. First, it was put to her that not only had she regularly had consensual sex with Govind, but that they had also gone together to a particular road in Suva (where it is well known that rooms can be rented by the hour)[4]. She denied that. Secondly, she was cross-examined about why she had not reported Govind's behaviour to the police sooner. She repeated that she had been scared of them and added that she was a shy person, but she acknowledged that that had not prevented her from reporting someone else to the police in the past who she claimed had sexually abused her[5]. Thirdly, it was put to her that her husband had demanded $30,000 from Govind[6]. The suggestion – certainly implied if not spelled out in so many words – was that she was making up these allegations in order to extort

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Page 337 of the Record of the High Court.

4 Page 337 of the Record of the High Court.

5 Page 341 of the Record of the High Court.

6 Page 341 of the Record of the High Court.

money from Govind. She denied that. Indeed, she claimed that she had not even known that her husband had made any such demand of him.

12. *The husband's evidence*[7]. The woman's husband was the only other witness for the prosecution. The material part of his evidence related to what his wife had told him. He confirmed her evidence about what she had told him following the first occasion on which she claimed Govind had raped her. His evidence was that he had not believed her, not just because he thought that she was using it as an excuse to leave the farm, but also because Govind had treated him like a son. However, he did no confirm the rest of her evidence about what she had told him. As for the second occasion on which she claimed that Govind had raped her, he did not say anything about her having told him about that. And as for the occasion on which she claimed that Govind had exposed himself to her, his evidence was that she had told him that he had *raped* her, not that he had simply exposed himself to her. Nor did he acknowledge that she had threatened to leave him if he did not help her to report the matter to the police. His evidence was that he had been shocked by what his wife had told him as he had never thought that Govind would behave in that way towards her. He said that he asked her to tell him the truth about what had happened so that he could report the matter to the police, who he confirmed his wife was scared of. And when the allegation that he had tried to extort $30,000 from Govind was put to him, he denied that.

13. *The defence case*. Govind did not give evidence, but a number of witnesses were called on his behalf. There were two topics on which they gave relevant evidence. One of the witnesses[8] said that in December 2016, ie a few weeks after Govind had been charged, the woman's husband asked him to tell Govind that if Govind paid $40,000 they would drop the case, and that the witness would be paid $10,000 – presumably for acting as the go-between. The witness went on to say that he told Govind what the woman's husband had said, and that Govind's response was that he would not pay any money. Other witnesses[9] spoke of having seen the woman often fighting with her husband, and two of them spoke about her having on one occasion stabbed him with a

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7 Pages 344-347 of the Record of the High Court.

8 Viliame Gauna, whose evidence is at page 348 of the Record of the High Court.

9 Kawal Chand, whose evidence is at page 349 of the Record of the High Court, and Ashnil Prasad, whose evidence is at pages 351-352 of the Record of the High Court.

pair of scissors[10]. Indeed, another witness – Govind's son – referred to the fact that the woman's husband had obtained a domestic violence restraining order against her[11].

*The judge's judgment*[12]

14. The assessors expressed the unanimous opinion that Govind was guilty on all charges. The judge took the same view. He was alive to the fact that the case turned on the woman's credibility, and he regarded her as credible even though her evidence had been inconsistent on what he called "some peripheral matters". And when it came to consent, he was also alive to the fact that freedom of choice is crucial to the issue of consent. He found that the woman had had no choice but to submit to Govind's sexual demands. Once he had found her evidence to be broadly true, Govind's conviction was going to be inevitable.

*The grounds of appeal*

15. The attack on the conviction has three planks. The first relates to the judge's summing up to the assessors. It is said to have been incomplete. The second relates to the judge's judgment. It is said that the inconsistencies in the woman's evidence were not peripheral. Thirdly, it is said that Govind was denied a fair trial because such advice as he had received from his lawyer about whether he should give evidence was wholly inadequate. I deal with each of these grounds in turn.

*Ground (1): The summing-up*[13]

16. The judge's summing-up has been subjected to much criticism by Mr Sharma. The criticism is that it was incomplete in the sense that the judge did not remind the assessors of the inconsistencies in the woman's evidence, of the implausibilities in her account, and of other things which could be said to have cast doubt on her credibility. Again, it is necessary to deal with each in turn.

17. (i) *The delay in reporting the incidents to the police.* The defence case was that the woman did not report the two earlier incidents to the police, and did not report the third incident to them immediately, because they never happened. Her explanation for not

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10 Chanderesh Goundar, whose evidence is at pages 350-351 of the Record of the High Court, and Ashnil Prasad.

11 Page 351 of the Record of the High Court.

12 Pages 307-308 of the Record of the High Court.

13 Pages 296-306 of the Record of the High Court.

reporting them to the police was that she was a shy woman who was scared of the police. Indeed, she could have said, but did not, that if her husband had not believed her – at any rate about the first occasion when she alleged that Govind had raped her – why would the police? The defence said that that the fact that she had previously reported someone else to the police for sexually abusing her was inconsistent with her claim to be shy and scared of the police. The criticism of the judge is that he did not remind the assessors in his summing-up of her admission that her shyness and her fear of the police had not prevented her from reporting someone else's unwanted sexual overtures to the police.

18. It is important not to attach too much weight to this criticism of the judge's summing-up. Had the judge reminded the jury of the previous report the woman had made to the police, he would have had to tell the assessors that there had been no evidence about what that man was supposed to have done to her. It may have been something far less serious than rape.[14] In those circumstances, an appropriate direction might have been that whereas a woman may be willing to report a relatively minor unwanted sexual encounter, she may well be too ashamed and embarrassed to report rape. That is a direction which judges in other jurisdictions are required to give. It was a matter of judgment for the judge to decide whether to take this course or not to remind the assessors at all about the previous report the woman had made. The judge decided not to remind the assessors of that, and I do not think that he can really be criticised for that.

19. Mr Sharma made two other points in this context. By not reporting the first two incidents to the police, the woman denied them the opportunity of requesting her to be medically examined. And the only logical reason for her to have been scared of the police as she claimed was because she knew that any claim she made to the police that she had been raped would have been false. However, these were not points made by the defence at trial, and the judge therefore cannot be criticised for failing to mention them to the assessors. In any event, the points are hardly persuasive. Because the

[14] We now know that the offence was indeed a minor one. The man had admitted exposing himself to her, and had been given a short suspended sentence of imprisonment. Attached to Mr Sharma's written submissions were the magistrate's sentencing remarks. But none of this was before the court at Govind's trial, and therefore has to be put to one side.

woman claimed to have submitted to Govind's demands, it is unlikely that there would have been any signs on her that force had been used. And since Govind's case was that they had had consensual sex on a number of occasions, the presence of his semen on any swabs taken from her would on his case only have proved intercourse, not rape. And as for whether her claim to be scared of the police was attributable to the fact that she knew she would be lying to them, it could have been just as attributable to the natural reluctance of many women to reveal having been raped – something which they might be too ashamed or embarrassed to talk about.

20. (ii) *The defence case*. Although Govind did not give evidence, this was not a case in which the defence were simply arguing that the prosecution had not proved its case. A positive case had been put to the woman – that she and Govid had regularly had consensual sex, and had even gone to an area where rooms can be rented by the hour. The criticism of the judge – not advanced in the grounds of appal but advanced orally in response to questions from the court – is that he did not remind the assessors of that. Again, I do not think that criticism of the judge should be taken too far. Had the judge reminded the assessors that that had been Govind's case as put in cross-examination, he would have had to tell the assessors as well that Govind's counsel would only have made that suggestion on the basis of his client's express instructions. Since Govind did not give evidence, the judge would have had to tell the assessors that what Govind had told his lawyers was not made on oath, or made in circumstances in which he could have been cross-examined about it. In my opinion, the judge was right not to remind the assessors of the case advanced on Govind's behalf in cross-examination without having first warned Mr A Reddy, Govind's lawyer at trial, of the additional direction he would have to give the assessors if he reminded them of that. In any event, it is inconceivable that the assessors needed reminding of that. They would have remembered from the cross-examination of the woman that that was what Govind was saying through Mr Reddy.

21. (iii) *The woman's behaviour towards her husband.* Although the judge reminded the assessors of the evidence that the woman and her husband used to fight with each other, one of the criticisms of the judge is that he did not remind them that on one occasion she was supposed to have stabbed him with a pair of scissors, and that he had obtained a domestic violence restraining order against her. Nor did the judge explain to the assessors what the relevance of that evidence was – namely that it showed her to be far

from the timid person she claimed to be – though I am uncertain about whether that was an actual criticism of the judge.

22. Again, it is important not to attach too much significance to these omissions. The witnesses who gave evidence about the woman stabbing her husband with a pair of scissors may well have been hearsay: a careful reading of the judge's note of their evidence suggests that they were going on what other people had told them. If that is correct, the evidence would have been inadmissible, and it would not have been right for the judge to remind the assessors of it. I think that the judge should have reminded the assessors of the evidence about the domestic violence restraining order, but (a) the assessors would have remembered it anyway (it was given the day before they retired to consider their verdicts), and (b) the relevance of the evidence was obvious and the assessors did not need to be told what it was.

23. (iv) *The extortion allegation.* The judge correctly reminded the assessors about the alleged attempt by the woman's husband to extort money from Govind in return for his wife dropping the case. He quite correctly told the assessors that they could take that evidence into account. There are, as I understood it, two criticisms of the judge in this context. The first is that he did not go on to explain to the assessors what the relevance of that evidence was. The relevance of it was that if that had indeed happened, it painted her in a bad light and undermined her credibility as a witness. In my opinion, the relevance of the evidence would have been obvious to the assessors: they did not need the judge to tell them what it was.

24. The second criticism of the judge arises from the fact that the only comment which the judge in fact made about the attempted extortion was that only the Director of Public Prosecutions could drop the charges. In defence of the judge, it has to be said that his comment reflected the points made in cross-examination and re-examination of the witness who had given evidence about the attempted extortion. The judge was doing no more than reminding the assessors of the point which – correctly or otherwise – the prosecution had made. In my respectful opinion, it would have been better if the judge had added that it did not really matter whether the alleged attempt to extort money could possibly have worked. What was relevant was whether the woman and her husband had thought that it might work. But it is very unlikely that the assessors would not have

appreciated that: I do not think they needed the judge to tell them that for them to have realised that.

25. (v) *The undermining of the defence witnesses.* The judge commented that none of the witnesses called on Govind's behalf "were present at the crime scene at the material time to assist us confirm or otherwise the complainant's version of events". The criticism of the judge is that this comment undermined the relevant evidence which they did give. I do not agree. The judge was simply saying that their evidence was not that of eye-witnesses to the events which gave rise to the charges. That cannot be interpreted as implying that their evidence was of no value. Their evidence related to other things which were said to undermine the woman's account.

26. (vi) *The inconsistencies in the evidence and implausibilities in the woman's account.* There were said by Mr Sharma to have been a number of inconsistencies in the woman's evidence which the judge did not remind the assessors about. For example, throughout her evidence the woman said (as did her husband) that Govind regularly came to their house. However, at one stage in her evidence, she said that Govind had not come to the farm between the first and second occasions on which she had allegedly been raped.[15] We need a little realism here. That part of her evidence was so obviously incorrect that either she did not say what the judge recorded her as having said, or that what she said was not what she had intended to say.

27. Other supposed inconsistencies relied upon by Mr Sharma were that the woman gave different versions in the course of her evidence of what had actually happened during the second occasion on which she had allegedly been raped, and conflicting evidence about whether Govind had employed her as well as her husband. And there was the inconsistency about when she told her husband about that incident – which is more particularly spelled out in para 5 above.

28. In addition, there were what Mr Sharma argued were a number of implausibilities in the woman's account which the judge did not remind the assessors about. For example, although the first occasion on which Govind allegedly raped her was the first occasion on which, according to her, she had ever met him, the conversation she claimed to have had with him that day is said not to have sounded like a conversation between two

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[15] Page 339 of the Record of the High Court.

people who had never met or the sort of conversation which would take place between a woman and her would-be rapist. Again, her description of both occasions on which she claimed to have been raped is said to have made it sound as if her real concern was not that she was having sexual intercourse against her will, but that her husband might come home while they were having sexual intercourse. And again, if Govind had spent much of the day at her house before he raped her on the second occasion on which she had allegedly been raped, why had she not left the house before it happened, in the light of what he had allegedly done to her two years earlier?

29. The difficulty with Mr Sharma's reliance on the supposed inconsistencies in the evidence and the supposed implausibilities in the woman's account is that it does not look as if any of them were relied on by Mr Reddy at the trial. If the judge's note of Mr Reddy's closing speech is anything to go by, the only one of these implausibilities upon which he relied was the woman's concern that her husband might walk in on what was happening. Mr Reddy made the understandable tactical decision to rely more on the failure to report the two alleged rapes to the police, the alleged attempt to extort money from Govind and the woman's behaviour towards her husband. The judge can hardly be criticised for not reminding the assessors of inconsistencies and implausibilities which the defence were not apparently stressing. Having said all that, many of the supposed inconsistencies and implausibilities were not, in my opinion, as stark or as persuasive as Mr Sharma said they were.

30. Finally, it should be noted that Mr Sharma's real criticism of the judge in connection with these inconsistencies and implausibilities is not so much that he failed to remind the assessors of them, but that he failed to direct them on "the test for considering" inconsistencies and implausibilities. Mr Sharma's written submissions described the test as follows:

> "i. Whether the inconsistency is significant, i.e. whether that inconsistency is fundamental to the issue that is being considered.
>
> ii. If it isn't then the inconsistency can be disregarded.
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> iii. If it is, then the Court must consider whether there is any acceptable explanation for the inconsistency. If there is an acceptable explanation then the underlying reliability of the account is unaffected.

iv. However, if there is no acceptable explanation for the inconsistency which is significant, then it may lead to the conclusion that the evidence is unreliable.

v. If the inconsistency is significant the Court could conclude that the witness is generally not to be relied upon."

The judge did not give the assessors a direction on those precise lines.

31. A direction of this kind may be important in some cases, and it will generally be required – albeit in an attenuated form – in cases which turn, as here, on a witness's credibility. But I would not regard it as essential. It is, for the most part, a statement of the obvious. An inconsistency in a witness's evidence which is not satisfactorily explained can undermine that witness's credibility or reliability, not just in relation to that part of the witness's evidence, but to the witness's evidence generally. But in this case the judge said:

> "If you find a witness credible, you are entitled to accept the whole or some of his or her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his or her evidence, in your deliberation."

Very broadly speaking, that encapsulated much of the direction which Mr Sharma said should be given. It was, I think, just sufficient in a case such as this.

32. In the final analysis, I think that what Mr Sharma was really doing was beguilingly trying to re-argue the case, though since that is not permissible in an appellate court, Mr Sharma realistically put his case on the basis of deficiencies in the summing-up. For the reasons I have given, I do not think that the criticisms of the judge's summing-up are such as to cause the judge's verdict to be set aside.

*Ground (2): The judge's judgment*

33. The judge is criticised for describing such inconsistencies as they were in the evidence as "peripheral". It is claimed that they were not peripheral: they went to the heart of the case. I do not agree. They were peripheral in the limited sense in which the judge, I think, used the term, ie they did not directly relate to what had actually happened on the three relevant occasions. That is not to say that they were unimportant. They went to the woman's credibility as a witness, and that is, of course, crucial in a case which turns almost wholly on one person's credibility. But the judge was alive to that. His comment that she had been inconsistent in some peripheral matters came immediately

after he had concluded that she had been a credible witness. Indeed, he said in terms that he found her to be credible "despite" the inconsistencies in her evidence.

*Ground (3): The criticisms of Mr Reddy*

34. It sometimes happens – much more often than is justified – that defendants complain about how their lawyers represented them at their trial. They argue that their lawyer's incompetence was such that it undermined the fairness of the trial. In this case, Govind makes four criticisms of Mr Reddy.

35. (i) *The woman's failure to attend court.* On the day the trial was due to start, the woman failed to come to court. The judge was told by the prosecution that the woman had travelled to Suva from Wailoku that morning[16]. A bench warrant for her arrest was issued, and the trial was adjourned to the following day. The woman came to court the next day, but if the judge was told why she had not been in court the previous day when the case was ready to begin, that does not appear in the judge's notes. The case then proceeded in the normal way. The criticism of Mr Reddy is that he did not cross-examine the woman about this. Mr Sharma wrote in his written submissions that there was "a very high probability that the Complainant did not turn up to Court to give evidence on the first day because she knew she had lied about the allegations and did not want to give evidence". This is, of course, a matter of speculation. It might just have been that she had got cold feet, not because she knew she was going to have to lie, but because like many people she was just nervous about having to give evidence in a court of law. None of this, though, was tested by Mr Reddy in cross-examination. Mr Sharma argues that it should have been.

36. The difficulty with this line of argument is that Mr Reddy's reasons for not cross-examining the woman on the topic have not been explored. He was not asked to explain why he did not take that course. As we shall see, he was asked to comment on another criticism of him – following the procedure laid down in *Nilesh Chand v The State* [2019] FJCA 254 – but not on this topic. For all we know, he may have made the decision not to cross-examine her on this topic because he feared that the assessors and the judge might sympathize with any misplaced sense of shame she might have felt about submitting to Govind's demands and any embarrassment on her part to talk in public about really intimate things. In any event, the lawyer having the conduct of the

[16] Page 334 of the Record of the High Court.

case has to make tactical decisions throughout the trial. So long as his decision is within the range of reasonable decisions which could be made in the circumstances, his trial will not be rendered unfair simply because other lawyers might have come to a different tactical decision. Without Mr Reddy's comments on this complaint, it is impossible for me to say that no lawyer could reasonably have taken the course he chose to take.

37. (ii) *The cross-examination of the woman.* It will be recalled that Mr Reddy put Govind's case to the woman – that they had had consensual sex about ten times and had gone to a particular area in Suva (where it is known that rooms can be rented by the hour). The criticism of Mr Reddy is that, when the woman denied that, he did not go on to ask her further questions on the topic, such as the dates and times when that had happened.

38. This line of argument has the same problems as the previous one. Mr Reddy was not asked why he did not do that. For all we know, Govind might not have given him instructions about when and at what time it had happened. Moreover, without any evidence supporting those allegations, the view could legitimately be taken that putting further details to her would have been pointless. Indeed, if Govind ultimately chose not to give evidence, cross-examination along the lines suggested might only have highlighted the fact that Govind had chosen not to support the allegations with his own evidence. Again, without Mr Reddy's comments on this complaint, it cannot be argued that no lawyer could reasonably have taken the course which Mr Reddy took.

39. (iii) *The domestic violence restraining order.* The woman was being re-examined when the court adjourned for the day. The next morning, Mr Reddy told the judge that the defence had found out about the domestic violence restraining order. The prosecution said that they would object to evidence about that.[17] The criticism of Mr Reddy is that he did not apply to the judge for permission to re-open his cross-examination of the woman to ask her why she was still living with her husband, nor did he cross-examine her husband about it when he came to give evidence. Instead, Mr Reddy elicited the evidence about it from one of the defence witnesses[18].

40. This line of argument is subject to the same flaws as the two previous ones. Mr Reddy has not been asked to explain why he chose to take the course he did. It might have

[17] Page 343 of the Record of the High Court.
[18] Page 351 of the Record of the High Court.

been quite a canny tactic on his part. Having been told that the prosecution would object to the admissibility of the domestic violence restraining order, he had an excuse for not putting it to the woman and her husband and thereby running the risk of getting answers which could downplay the significance of the potential point. Rather, bring out the existence of the order through one of the defence witnesses, and argue the issue of admissibility then if necessary. Once again, without Mr Reddy's comments, I cannot say that no lawyer could reasonably have taken the course he did.

41. (iv) *The advice about whether to give evidence*. The advice which Mr Reddy gave Govind about whether or not he should give evidence is by far the most powerful ground of appeal when it comes to the criticisms of Mr Reddy. It is a ground of appeal which I have had to think long and hard about. It is first necessary to identify what Govind himself and Mr Reddy say was said. Govind's account is set out in para 16 of an affidavit he swore in support of his application for bail pending his appeal to the Court of Appeal. He said[19]:

> "As I recall, once the Court ruled that there was a case to answer my Counsel just told me that everything was under control, that he had the case in the bag and there was no need for me to give oral evidence. He assured me that he had already won 18 rape cases previously."

42. In order to obtain Mr Reddy's account of what had been said, Mr Sharma's firm wrote to Mr Reddy's firm. Copies of the three letters – from which extracts are set out in this paragraph and the next were exhibited to that affidavit. The material parts of the letter read as follows[20]:

> "When we asked [Mr Sami] why he chose to remain silent we were informed that he was just told by you to remain silent as you had matters under control.
> Could you please provide to us any written legal advice that you provided to Mr Sami about his options and any written instructions from Mr Sami that he had considered such legal advice and was agreeing to the option to remain silent."

The letter did not state that Govind had waived legal privilege – something which he would have to have done if Mr Reddy could lawfully give the information sought in this letter. I assume, therefore, that that was conveyed to Mr Reddy in some other way.

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19 Page 59 of the Record of the Supreme Court.
20 Page 103 of the Record of the Supreme Court.

43. The material part of Mr Reddy's firm's reply was as follows[21]:

> "Kindly note that once the prosecution closed its case, our Mr Reddy was asked by the judge to proceed with the Defence case.
> Our Mr Reddy requested that the matter be stood down so that he could receive instructions from Mr Sami in relation to whether he should give evidence. The Judge also explained to Mr Sami his options. This would be reflected in the court record.
>
> Our Mr Reddy then took Mr Sami outside the court house while the court was still sitting. Mr Reddy advised Mr Sami of his options. During the trial which was over a week, Mr Reddy had talked to Mr Sami several times about whether he would or would not give evidence. He again explained to Mr Sami about his option of giving or not giving evidence.
> Mr Sami outside the court house then asked our Mr Reddy of his opinion on whether Mr Sami should give evidence or not. Mr Reddy was of the opinion that enough damage was done to the prosecution case and it would be risky to put Mr Sami on the stand.
>
> Mr Sami the[n] agreed that he should not give evidence and Mr Sami was also of the opinion that enough damage was done to the credibility of all the witnesses. At the end after receiving Mr Reddy's opinion Mr Sami chose not to give evidence. As you would be aware it is impossible to give a written advice to a client about his options to give evidence during the trial. The option to take can only be exercised at the close of prosecution case. The judge would proceed with the case and it is impossible to give written instructions. The next best thing is to stand the matter down and take instruction from client which our Mr Reddy did.
> The judge was informed of Mr Govind Sami decision not to give evidence."

In due course, Mr Sharma's firm sent Mr Reddy a copy of the written submissions to be used on the appeal to the Court of Appeal, and advised him of his right to make such representations to the Court of Appeal as he chose[22]. So far as I can tell, Mr Reddy did not make any such representations.

44. This is a topic on which I would have been greatly helped by the views of the Court of Appeal. It was one of the grounds of appeal to the Court of Appeal. Unfortunately, both what Govind had said in his affidavit and the letters were overlooked by the Court of Appeal. Because they thought that there had been no evidence at all in support of this ground of appeal, the Court of Appeal dismissed it out of hand. That is very surprising. The evidence had been referred to by Mr Sharma in paras 8.9-8.15 of his

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[21] Page 105 of the Record of the Supreme Court.
[22] Page 114 of the Record of the Supreme Court.

written submissions to the Court of Appeal[23]. Indeed, para 8.10 of the written submissions said that the affidavit (to which copies of the letters were exhibited) was annexed to the submissions. It looks as if the members of the Court of Appeal had not read those submissions with sufficient care. Not that this matters now. The relevant letters are before the Supreme Court and we can consider this ground of appeal in the light of them.

45. Defendants need advice about whether or not to give evidence. It is not enough simply to inform a defendant what his options are. A defendant needs advice about the advantages and disadvantages of each of his options. Only then can he make an informed decision about which option to choose. I say "choose" because at the end of the day it is his decision whether to give evidence, not that of his lawyer. The letter from Mr Reddy's firm included this sentence:

> *"At the end after receiving Mr Reddy's opinion, Mr Sami* ***chose*** *not to give evidence."* (Emphasis supplied)

Govind does not dispute that. He did not actually say in his affidavit that it was his choice not to give evidence, but Mr Sharma accepts that it was because in his firm's letter to Mr Reddy's firm Mr Sharma wrote:

> *"When we asked [Mr Sami] why he* ***chose*** *to remain silent ..."* (Emphasis supplied)

46. It follows that the only issue relates to the sufficiency of the advice which Mr Reddy gave Govind about the pitfalls of exercising each option. And since Govind chose not to give evidence, the real question is whether he was sufficiently advised about the advantages and disadvantages of not giving evidence. The evidence is that the only advice he gave related to how the case had gone so far. There are differences of emphasis between Govind's account of what was said and that of Mr Reddy, but the effect of the advice was that things had gone really well, that there was every chance that even without Govind's evidence he was very likely to be acquitted, and that giving evidence could be risky.

47. Broadly speaking, there are three disadvantages about not giving evidence. The first is that the assessors might think you have something to hide. If you are innocent, why

[23] Pages 97-198 of the Record of the Supreme Court.

not give your account? That is a strong argument in those jurisdictions where the jury can draw inferences adverse to the defendant from his failure to give evidence. But that does not apply to Fiji. Here judges warn the assessors that no inference adverse to the defendant can be drawn from exercising his right of silence. Indeed in this case, the judge gave the assessors that warning twice – in paras 23 and 38 of his summing-up.[24] We have to assume that the assessors followed the judge's directions, as did the judge himself, so that this possible disadvantage about not giving evidence falls away.

48. The second disadvantage about not giving evidence related to the comment which the judge would be entitled to make about the fact that a positive case had been put on Govind's behalf. It would have been perfectly permissible for the judge to have given the assessors a direction on the lines set out in para 15 above – namely that the case Govind had instructed his lawyer to put had not been made on oath and had not been tested by the cross-examination of Govind. However, the judge did not in the event give such a direction to the assessors, and so this possible disadvantage about not giving evidence did not materialise.

49. I turn to the one important disadvantage of giving evidence, and that is that you run the risk of undoing such good work as your lawyer may have achieved during the prosecution's case. A basic rule is not to call evidence unless you need to. In many cases the need to do so is obvious. But there also many cases in which the issue is less clear-cut. In such cases, how the defendant is likely to give evidence becomes important. Any success in casting doubt on the prosecution's case can sometimes be demolished by the defendant's own evidence. This is a tricky topic for any defence lawyer. It is difficult for him to tell his client that he will make a bad witness. It could result in the client losing confidence in him. It is frequently better to dress that up by simply saying that it is risky for the defendant to give evidence. Of course, by not giving evidence, a defendant does not give the assessors or the judge an opportunity to hear his side of the events which gave rise to the charge, and it is a matter of fine judgment what advice should be given.

50. Looking at the case as a whole, I have concluded, not without hesitation, that the advice which Mr Reddy gave Govind was advice which he could reasonably have given in the circumstances. I have particularly borne in mind (a) the evidence which had emerged

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[24] Pages 301 and 305 of the Record of the High Court.

during the prosecution's case about the woman's failure to report what had happened to her to the police until much later, and (b) the evidence which would come out during the defence case about the attempted extortion and the domestic violence restraining order. Moreover, he would have formed his own view about how well the woman had given her evidence, and what Govind would have been like as a witness. All in all, I do not think that what Mr Reddy told Govind was so beyond what might be regarded as appropriate that it undermined the fairness of Govind's trial.

*Conclusion*

51. I would give Govind leave to appeal against his conviction on the basis that, since the Court of Appeal did not address properly Govind's complaint about his legal representation, a grave and substantial injustice may have occurred if the Supreme Court had not addressed the issue. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal as the hearing of the appeal, but for the reasons I have endeavoured to give I would dismiss the appeal.

**Qetaki J**

52. I have read the judgment of His Lordship Brian Keith. I agree entirely with the judgment and proposed orders.

*Orders*:

(1) Leave to appeal against conviction granted.

(2) Appeal dismissed.

**The Hon. Mr. Justice Anthony Gates**
Judge of the Supreme Court

SUPREME COURT FIJI

**The Hon. Mr. Justice Brian Keith**
Judge of the Supreme Court

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