IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. CAV0031 OF 2022
[Court of Appeal No: AAU0060 of 2017]
Lautoka High Court: HAC 6/2014]

BETWEEN : **ERONI CEVAMACA**

Appellant

AND : **THE STATE**

Respondent

Coram: The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr. Justice Arnold Terence, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel : Petitioner in Person
Ms. Uce. R for the Respondent

Date of Hearing: 15, 19, and 26 August 2024

Date of Judgment: 29 August 2024

JUDGMENT

Calanchini, J

[1] I have read the draft judgment of Qetaki J and agree with his reasoning and conclusions.

Arnold, J

[2] I have read the judgment of Qetaki JA in draft and agree with the orders he proposes.

Qetaki, JA

[3] This is a Petition by Eroni Cevamaca (Petitioner) for special leave to appeal and for enlargement of time, in challenging his conviction in the Lautoka High Court on a single count of rape committed at Lautoka in the Western Division on 11 January 2014 contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

[4] According to the Information, the particulars of the offence was that on the 11th day of January 2014, at Lautoka in the Western Division, the Petitioner, inserted his penis into the vagina of Litia Lewairavu, without her consent.

[5] At the end of the summing-up on 13 December 2016 the assessors unanimously had opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgement delivered on 15 December 2016, convicted the appellant and sentenced him on 29 December 2016 to 08 years and 11 months of imprisonment with a non-parole period of 07 years.

[6] The appellant filed a timely leave to appeal application against his conviction and sentence. The application for leave to appeal against sentence was subsequently abandoned. At the leave stage, before a single judge (Prematilaka, RJA), leave to appeal against conviction was allowed. The learned single judge had conducted a thorough evaluation and assessment of the learned trial judge's judgment, and stating at paragraph [51] of the Ruling:

> *"[51] ……..I consider the issues as to whether the trial judge's judgment had properly focused on the weight of the evidence and reflected correctly as to the credibility of the witnesses and whether the reasons given to disagree with the assessors are capable of withstanding critical examination in the light of the whole of the evidence presented at the trial, to be questions of mixed law and facts*

which should be considered by the full court according to the principles set out in section 23(1) of the Court of Appeal Act."

[7] The Court of Appeal (Prematilaka RJA, Gamalath JA, Nawana JA) heard the appeal, which was pursued on 4 grounds on 9 November 2022. The Court dismissed the appeal and confirmed the conviction.

The Facts

[8] The facts are stated in the judgment of the learned trial judge which are also set out in paragraph [3] of the Ruling of the learned single judge dated 22 September 2020. However, the facts gathered from paragraphs [22] to [25] of the Judgment of the Court of Appeal, are set out below: -

"[22] Evidence of the prosecution case revealed that the complainant and her friends had met the appellant and his friends at a nightclub in Lautoka in the early hours of 11 January 2014.Later, they got into a 7-seater van to go to the house of the appellant to have more drinks. On arrival at the appellant's house, Tomu and Lesi, being two others in the group who were in a relationship, got into a bedroom in the house while the appellant went into another bedroom. The complainant and her associate, Jone, were in the sitting room waiting for drinks. After a while, the complainant encountered the appellant, who was standing on the doorway of his bedroom, when she was returning from the washroom. At this point, the complainant was invited by the appellant to have sexual intercourse, which was refused by the complainant.

[23] The appellant thereupon, forcefully took the complainant into the bedroom, which was resisted by the complainant and the witness, Jone, unsuccessfully. While Jone was pulling the complainants hands in resistance, the appellant had punched Jone. The complainant was, thereafter, pulled inside the bedroom and pushed on to the bed where she started struggling with the appellant. The complainant, who was wearing leggings and a top, said in her own words that 'the appellant was all over her'. The appellant removed one side of her leggings and inserted his penis into the complainant's vagina and had sexual intercourse. She said that the appellant did not have her consent.

[24] Jone Namakadre, who witnessed the incident, said that the complainant was trying to defend herself by getting hold of the door frame. The appellant, however, succeeded in pulling the complainant inside the bedroom, closing the door and locking it. Jone's attempt to prevent the complainant being taken inside the room and opening the door was not successful. He heard the appellant screaming in the bedroom.

[25] The learned trial judge then referred to the evidence of the appellant, who took-up completely a different position stating that he had come to his house after inviting the complainant to have sex with him……"

High Court Judgment (per: Judge Sunil Sharma)

[9] The Judgment explained that the accused was charged contrary to section 207(1) of (2) (a) of the Crimes Decree 2009, with the following particulars: That Eroni Cevamaca, on 11th day of January 2014, at Lautoka in the Western Division, inserted his penis into the vagina of Litia Lewairavu, without her consent. That three assessors had returned a unanimous opinion that the accused was not guilty on the count of rape. The learned trial judge directed himself, in his judgment in accordance with his summing-up and the evidence adduced at the trial.

[10] The learned judge recited the facts and the gist of the evidences for the complainant (paragraphs5 to 8 of Judgment) and that of the accused (paragraphs 9 and 10 of Judgment).

[11] He commented on the inconsistencies of evidence of the complainant and her one witness at paragraph 11 and 12, stating:

"11. During the trial both the prosecution witnesses were referred to their police statements given to the Police on the day of the alleged incident with the evidence they gave in court. Both the witnesses agreed that there was difference between the versions they had told the Police when everything was fresh in their mind and the version they had told the court.

12. I take into consideration that passage of time can affect one's accuracy of memory and I note that the alleged incident happened some two years ago. I would have been very surprised if there weren't any inconsistencies and the witnesses would have told the court everything in accordance with what they told the Police in their police statements. I find that the inconsistencies were not significant which had adversely affected the reliability and credibility of the complainant and other prosecution witness in respect of what had happened at the house of the accused."

[12] At paragraphs 13, 14, and 15. of the Judgement, the learned Judge gave his views on the evidence of the complainant as truthful, and the evidence of the accused as doubtful, as follows:

13. I find that the complainant had told the truth in court and I accept the evidence of the complainant as reliable and truthful. She was forthright in her evidence and was able to withstand cross-examination. Her demeanour is consistent with her honesty.

14. I find that the accused did not tell the truth which has led me to doubt he had sexual intercourse with the complainant with her consent as stated by him. I do not accept that he invited the complainant to come to his house with the view to having sexual intercourse with her and that she agreed. I am, surprised that the accused who knows the complainant by face only would have approached the complainant and asked her for sex when he had just met her. Thereafter he took everyone to his house, if the intention was to have sex with the complainant then why take everyone home?

[13] At paragraph 16, the learned Judge discussed the Doctor's evidence:

"16. Dr Nabaro who had examined the complainant on the day of the alleged incident was unable to conclusively state if rape had occurred as per his findings. I note that the Doctor had seen blood on his examination gloves upon vaginal examination, the Doctor informed the court it could have been through penetrative injuries or the patient could be menstruating at the time. The Doctor did not state that the complainant was menstruating when he examined her hence I am inclined to accept that the blood seen by the Doctor was as a result of force used."

[14] The learned Judge concluded his Judgment, as follows:

> *"17. For the reasons given I reject the unanimous opinion of the assessors. I accept the evidence given by the prosecution witnesses as credible and reliable over the evidence of the accused.*
>
> *18. I am satisfied beyond reasonable doubt that on 11th January 2014 the accused had inserted his penis into the vagina of the complainant without her consent.*
>
> *19. I also accept that the accused knew or believed the complainant was not consenting or didn't care whether she was consenting at the time in regards to the count of rape with which the accused is charged.*
>
> *20. In view of the above, I find the accused guilty as charged and I convict him for the offence of rape."*

Grounds of Appeal to Court of Appeal

[15] The 4 Grounds of appeal are, as follows:

Ground 1: *The learned judge did not provide cogent reasons when overturning the unanimous opinions of the assessors that the appellant was not guilty for the charge.*

Ground 2: *The learned trial judge erred in law and in fact by not directing himself and the assessors on how to approach and assess the omissions arising from the prosecution witness 'evidences on oath with their police statements*.

Ground 3: *The learned trial judge erred in law and in fact by misdirecting himself to conclude that the evidence of the inconsistencies of the prosecution witnesses is due to:*

i) The lapse of time can affect one's accuracy of memory;
ii) The inconsistencies are not significant which affects the reliability and credibility of the complainant and other prosecution witness.

Ground 4: *The learned trial judge in his judgment erred in law and in fact by misdirecting himself to reasonably base his conclusion that the blood seen by the doctor on his examination gloves is the result of force used whereas his Lordship had not considered that:*

(i) It is the doctor's evidence that he is unable to conclusively say that rape had occurred per his findings;

(ii) *It is the doctor's evidence that the blood on the examination gloves is either from penetrative injuries or the patient having menses;*
(iii) *It is not disputed issue in trial on the element of penetration;*
(iv) *There is no evidence adduced from the complainant that she received injuries as a result of the sexual intercourse.*

Approach

[16] The Court of Appeal (Nawana, JA), having considered the reservation made in the Ruling by the learned single judge, and "*the overall issue on the need to have cogent reasons in overturning the opinions of the assessors"*, considered: (a) the applicable statutory provision, section 237 of the Criminal Procedure Act 2009 and, (b) proceeded to consider the four grounds together (consolidation of grounds) for the determination of the appeal, since the matters raised are interconnected to the first ground of appeal.

[17] In terms of section 237 of Criminal Procedure Act, subsections (2), (4) and (5) are of relevance to this appeal, as follows:

> *"(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors."*
>
> *"(3) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion……"*
>
> *"(5) In every case the judge's summing up and decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes."*

Court of Appeal Judgment

[18] The judgment of the court examined the duty imposed on a trial judge in terms of section 237 of the Criminal Procedure Act in the context of **Lautabui v State** [2009] FJSC 7; CAV 24.2008 (6 February 2009) .

[19] In the case **Singh v State** [2020] FJSC 1; CAV0027 of 2018 (27 February 2020), this Court considered the duty of the High Court under section 237 of the Criminal Procedure

Act *vis-à-vis* the powers of an appellate court in expounding the depth of section 237 in the context of the need to give cogent reasons in a case where a trial judge overturns the opinions of assessors (page 11 Record of Supreme Court).

[20] At paragraphs [17] and [18] of the judgment, the Court stated:

> *"[17] Whilst being conscious of the duty cast on this court in a matter such as this, I observe that the learned trial judge, too, had dealt with the facts and the law in his summing-up and the judgment by way of a written ruling disagreeing with the assessors reasoning in my view, justifiably resulted in finding the appellant guilty.*
>
> *[18] The compliant with the requirement of section 237 as expounded by the Supreme Court, as observed above, could be deduced by referring to the learned judges reasoning. The learned judge in his judgment dated 15 December 2016 stated that:*
>
> > *"11. During the trial both the prosecution witnesses were referred to their police statements given to the Police on the day of the alleged incident with the evidence they gave in court. Both the witnesses agreed that there was a difference between the version they had told the police when everything was fresh in their mind and the version, they had told the court.*
> >
> > *12. I take into consideration that passage of time can affect one's memory and I note that the alleged incident happened some two years ago. I would have been very surprised if there weren't any inconsistencies and the witnesses would have told the court everything in accordance with what they told the Police in their police statements. I find that the inconsistencies were not significant which had affected the reliability and credibility of the complainant and the other prosecution witness in respect of what had happened at the house of the accused.*
> >
> > *13. I find the complainant had told the truth in the court and I accept the evidence of the complainant as reliable and truthful. She was forthright in her evidence and was able to withstand cross examination. Her demeanour is consistent with her honesty.*
> >
> > *14. I find that the accused did not tell the truth which has led me in doubt he had sexual intercourse with the complainant with her consent as stated by him. I do not accept that he invited the*

complainant to come to his house with the view to having sexual intercourse with her and she had agreed. I am surprised that the accused who knows the complainant by face only would have approached the complainant and asked her for sex when he had just met her. Thereafter he took everyone to his house, if the intention was to have sex with the complainant, then why take everyone home?

15. I have no doubts in my mind that the complainant told the truth in court. I also note that the complainant had promptly reported the matter to the Police and that the accused had not raised any motive on the part of the complainant to implicate him."

[21] The Court, after examining the cross-examination of the two witnesses for the prosecution reveals that the discrepancies raised were insignificant. The two witnesses had confirmed the material points presented by the prosecution to establish that the appellant had had sexual intercourse with the complainant without the consent of the complainant. The full court did not accept the evidence of the appellant as truthful.

[22] The learned trial judge did not find a reasonable doubt to displace the prosecution case. He thus rejected the opinions of the assessors and found the appellant guilty of rape. On examination of the evidence in the transcript the Court was of the view that the learned trial judge was correct in his holding that he could believe the evidence of the complainant as supported by witness Jone, and his reasoning was cogent.

[23] The learned judge had set out items of evidence in determining the key elements of the case (**Lautabui v State)**. The Court held, that the learned trial judge had discharged his duty in compliance with the statutory mandate under section 237 of the Criminal Procedure Act as the opinions of the assessors were not decisive in the final judgment of the case before the trial judge within the meaning of section 237 of the Criminal Procedure Act.

[24] The Court stated that this is not one of the cases where the verdict falls into any of the categories provided under section 23(1) (a) of the Court of Appeal Act, and under the

circumstances, it held that the appeal is not entitled to succeed on the sole ground (consolidated ground) urged by the appellant.

Grounds of Appeal (Supreme Court)

[25] The Petitioner, on 15 July 2024 filed his grounds to appeal against conviction and an application for enlargement of time. He was dissatisfied with the judgment of the Court of Appeal, and had filed an application on his intention to appeal at the Registry on 2 December 2022.However, no grounds of appeal was submitted with that application. That the application is out of time by approximately 1 year and 16 days. He relies on **Lepani Rokolaba v State** Criminal Appeal CAV 0011 of 2017, where Gates, P stated:

> *"[18] The filing of grounds later may constitute an informal petition document. If late in lodgement, as here, the application will have to be treated as an application to enlarge time. Such application must satisfy certain criteria before Petition itself can be considered."*

[26] The Petition grounds are set out below:

Ground 1: *Did the Court of Appeal erred in law in not addressing in their judgment the significant inconsistent evidence of the complainant and her witnesses, the significant material medical evidence in determining any forced sexual intercourse*.

Ground 2: *Whether the Court of Appeal erred in law in failing to make an independent assessment that the learned trial judge had shifted the burden of proof in his judgment resulting in a substantial and grave injustice to the petitioner*.

Ground 3*: Did the court erred in law failed in not giving his reasons as did the trial judge for not agreeing with the assessor's opinion when confirming the verdict and that the guilty verdict is unreasonable and cannot be supported having regard to the evidence resulting in a substantive and grave injustice to the petitioner.*

Ground 4*: Did the Court of Appeal erred in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence resulting in a substantive and grave injustice to the petitioner.*

Enlargement of Time

[27] The delay in filing of the Grounds of appeal is approximately 1 year and 16 days, which is a substantial delay and the application for enlargement has to be assessed against the established principles applicable to extension of time applications. Numerous cases both in Fiji and in other jurisdictions where the subject has been considered, including **Rasaku v State**, FJSC 17,CAV 0009 003 of 2019(24 April 2013) and **Kumar v State**, FJSC 17 CAV001 of 2009 (21 August 2012). In the latter case, this Court held, that appellate courts in an application for enlargement of time, the courts would, by way of a principled approach, examine five factors, when considering such applications, and those factors are:

(i) The reason for the failure to file within time;

(ii) The length of the delay;

(iii) Whether there is a ground of merit justifying the appellate courts consideration;

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) *If time is enlarged, will the respondent be unfairly prejudiced*.

[28] In **Rasaku**, this court held;

> *"These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the courts to uphold its own rules while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of the court."*

[29] The Petitioner's reasons in support the application for enlargement of time , submitted in his handwritten Grounds of Petition To Appeal Against Conviction and Application for Enlargement of Time on15th July 2024 are:

(a) The petitioner is applying in person. He has limited knowledge of judicial filing procedures and the necessary legal requirements.

(b) Lack of legal knowledge. Petitioner had sought assistance from other inmates in terms of gathering information, research and compiling of grounds of appeal.

(c) First application for leave to appeal. This is the first time for the petitioner to make an application for leave to appeal in person.

(d) Unaware of the petition filing procedure.

(e) The petitioner has been refused legal representation by the Legal Aid Commission via its letter from a Ms Mishra, dated 11 April 2023 which the petitioner received on the 3rd of May 2023.

[30] The application for enlargement of time, will be considered together with the application for Special leave made and to be assessed under section 7(2) of the Supreme Court Act. However, the outcome will be determined on whether there is *real prospect of success* for the belated grounds of appeal against conviction in terms of merit [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019).The reasons have been provided, and the respondent has not shown that prejudice would be caused by enlargement of time.

[31] On 14 August 2024, the date fixed for hearing of the petition, the Petitioner was not in attendance and the matter was adjourned to 11:30am on Monday 19 August 2024 for further mention in view of the difficulty the Petitioner has faced in completing and compiling his submissions. The Registry was directed to provide to the Petitioner a copy of the Record of the High Court and a copy of the Record of the Supreme Court by no later than 4:00pm on Monday 19 August 2024.The Petitioner appeared as scheduled, informing the Court that he is not legally represented and is requesting that time be granted for him to complete and file his submissions. Time was granted for the filing of the submissions, and the hearing was further deferred to Monday 26 August at 10am.The Petitioner's written submissions was filed on the morning of 26 August 2024.

[32] The Petitioner appeared in Person at the hearing.

Discussion

[33] The role of the Court of Appeal in the context of this case, is to determine whether the trial judge's judgment had properly focused on the weight of the evidence and reflected correctly as to the credibility of witnesses and whether the reasons given to disagree with the assessors are capable of withstanding critical examination in the light of the whole evidence presented at the trial. These are questions of mixed law and facts which should be considered by the Court according to the principles set out in section 23(1) of the Court of Appeal Act.

[34] I observed that the accused denied raping the complainant and maintained that stance throughout, including in this appeal. He maintained that during his first -time conversation with the complainant at the Zone Nightclub, when he had invited her to his house to have sex with him and that the complainant agreed. At his house, the accused asked the complainant to go to the bedroom. She stood up and he led her to the bedroom. In the bedroom both took off their clothes waist downwards and they had sexual intercourse. That the accused did not see any resistance or reluctance on the part of the complainant and that she had consented to having sex with him, he did not drag her into the bedroom or use any violence on her. The learned trial judge did not believe the petitioner's evidence adduced at the trial, and that he accepted and believed the complainant and the prosecutions other witness. At the hearing, the Petitioner relied on his written submissions. He had filed 4 grounds of appeal, which are now discussed.

GROUND 1: Did the Court of Appeal erred in law in not addressing in their judgment the significant inconsistent evidence of the complainant and her witnesses, the significant material medical evidence in determining any forced sexual intercourse. Were there inconsistent evidence and how did the trial judge address inconsistent evidence?

[35] The discussions underground 3 below, relative to whether the learned trial Judge had given cogent reason, in line with section 237 of the Criminal Procedure Act, are also relevant to this ground in so far as they relate to inconsistencies in evidences and the role of the trial judge and the Court of Appeal in dealing with them. Indeed, because of the interconnectedness of the grounds of appeal, discussions on one ground have a bearing on all other grounds as well, as appropriate. See also paragraphs [53] to [65] below.

[36] The contents of the judgment of the Court of Appeal is set out in paragraphs [18] to [24] above. An analysis of paragraph [17] of the judgment would suggest that the Court of Appeal did not independently examine and evaluate the evidence adduced at the trial which led to the trial judge overturning the unanimous opinion of the assessors. Although the Court was conscious of its duty in an appeal in criminal matters, the Court, appear to have opted to accept the decision of the learned trial judge, without carrying out an independent evaluation of the evidence. Paragraph [17] of the Court of Appeal judgment states:

> *"[17] Whilst conscious of the duty cast on this court in a matter such as this, I observe that the learned trial judge, too, had dealt with the facts and the law in his summing-up and by way of a written ruling disagreeing with the assessors reasoning in my view, justifiably resulted in finding the appellant guilty."*
> (Underlining is for emphasis)

Role of Trial Judge and Appellate Courts

[37] The role of the High Court (trial judge) and of the appellate courts, in criminal proceedings was addressed in the case **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), in the context of the Duty to Give Cogent Reasons (in paragraphs [19] to [28] thereof), as required under section 237 of the Criminal Procedure Act. At paragraph [23] of the judgment, the Court cited **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), on the role of a trial judge as well as the supervisory function of an appellate courts, as follows:

"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."

Paragraphs [24] and [25] state:

"[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. Unlike in Ram v State, where the Court quashed the conviction and acquitted the accused on the basis that the whole of the evidence led in that case, 'it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder", in the instant case, this Court is confronted with the difficulty that the learned trial judge has not dealt with some material questions that arise in the case with sufficient cogency, particularly in regard to the matters already discussed in this judgment pertaining to (1) the voluntariness of the petitioner's confession and (2) the reliability of the testimony of Sunita Devi, and a few other matters highlighted by Stock under the headings "hearsay and recent complaint "and intent. In other words, apart from the non-directions and misdirections adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate Court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident on the available evidence that the trial judge had failed to effectively discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the

assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision."

Inconsistencies

[38] The requirement that the Court of Appeal "*independently assess the evidence*" is made difficult in this case. This is because although the Court has access to a transcript of the *viva voce* evidence of the two witnesses for the prosecution, there is no transcript of the evidence given by the Petitioner or the doctor who examined the complainant, who was called as a defence witness. Nor is there a record of that evidence in the Judge's notes, as there sometime is.

[39] The Court does have access to the Petitioner's caution statement and the doctor's medical report, as well as to defence counsel's closing address and the trial Judge's summing up, which contains a summary of the defence case. But in a case such as this, the absence of a verbatim record of the *viva voce* evidence adduced by the defence does complicate the task of assessment. This difficulty is not addressed in the Court of Appeal's judgment.

[40] The Court of Appeal regarded the inconsistencies as "*insignificant discrepancies"* without specifying what/which inconsistency comes under the category. The correct questions to ask are: What are the effects of the discrepancies, inconsistencies and/or omissions, specifically, and also collectively? What is the outcome of the evaluation and assessment of the medical evidence, in the light of the evidence of the complainant, and the case for the prosecution? Were there injuries, and their nature, consistent with the allegations made, bearing in mind that, in sexual cases, corroboration is not a requirement? The Petitioner contended that sexual intercourse with the complainant was consensual. However, the Court stated:

"[26] A close scrutiny of the cross-examination of the two witnesses for the prosecution reveals that it refers to some insignificant discrepancies. More importantly, most of the questions serve to show the two witnesses had confirmed the material points presented by the prosecution to

establish that the appellant had had sexual intercourse with the appellant without the complainant's consent.
Underlining is for emphasis)

*[27] In the result, the learned trial judge did not accept the evidence of the appellant as truthfu*l."

[41] There is no indication in the judgment of the High Court or the Court of Appeal to the effect that they had carried out their own independent evaluation and assessment of the evidences. It would appear that the Court of Appeal, simply endorsed the conclusions of the learned trial judge as to the truthfulness of the complainant's evidence, and rejected the accused's story, without carrying out a proper evaluation and assessment of the Medical report and the expert Medical evidence. Such evidence relate and go to the issues of reliability and credibility of the complainant's evidence and the prosecution's case.

Medical Report and Doctor Nabou's Evidence

[42] The Court of Appeal did not specifically consider the Medical report and the Doctor's expert evidence. Evaluation and assessment of critical evidence, and indeed all evidence, would assist in weighing them as to whether the complainant's evidence can be relied upon, and whether the complainant was to be believed. Both the learned trial judge and the Court of Appeal need to assess and evaluate the quality, nature, scope and extent of the Medical Report and expert medical evidence. This is crucial also, as the Medical Examination took place on the same day after the incident occurred. It appears no such exercise was consciously undertaken.

[43] At the hearing, counsel for the State was asked, why the prosecution did not call the Doctor to explain the Medical Report on the outcome of the medical examination. The Court was informed that, the report does not assist the case for the prosecution. It was the accused who called the Doctor to explain the outcome of the complainant's medical examination, when the prosecution opted not to call the Doctor.

[44] There are no injuries consistent with the application of force, being dragged and punched three times on a thigh. There were no scratches and no signs of forceful sexual intercourse. The learned trial judge commented only on the blood stains collected in the Doctor's glove during the vaginal examination, He accepted that it was from the forceful sexual intercourse, with the accused. How did he arrive at the conclusion? The Doctor was clear in his evidence that the blood could be from the complainant's menstruation, or from sexual intercourse, without making a conclusive opinion, on which of the two options, is the cause of bleeding in the complainant's vagina.

[45] Why is it important that the learned trial judge and the Court of Appeal in its supervisory role, to carry out a proper evaluation and assessment of the Medical report and expert medical evidence? Because it assists the Court, to ascertain whether the trial judge's conclusion and finding, that the elements of the offence of rape as charged, were proven beyond reasonable doubt. It is also to ascertain whether, the learned trial judge, in overturning or disregarding, the unanimous opinions of the assessors, had, in his judgment (comprising the summing-up and judgment) was cogent. The learned trial judge is required under section 237 of the Criminal Procedure Act to provide cogent reasons. The supervisory role of the appellate Courts is to ensure that if no cogent reasons was given, that it is to determine whether the accused was prejudiced by it.

[46] There was no comment or direction on inconsistencies at the end of the trial judge's summation of the Defence case, nor at the end of the summing-up. This would indicate that the witnesses for the accused were not inconsistent in their evidence, meaning, the witness's police statement and the evidence in court on the same issues are consistent. This may also explain why the assessors had returned a unanimous verdict of not guilty, a conclusion and verdict which they are entitled to arrive at.

[47] The Ground is arguable. It meets the requirements of section 7(2) of the Supreme Court Act.

<u>GROUND 2</u>: Whether the Court of Appeal erred in law in failing to make an independent assessment that the learned trial judge had shifted the burden of proof in his judgment resulting in a substantial and grave injustice to the petitioner.

[48] The learned trial judge referred to the standard of proof required to be satisfied by the prosecution in various paragraphs of the summing-up. Immediately after his summing - up on the elements of the offence, the learned trial judge (pages 86 and 87 Record of High Court) stated:

> *"26. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond doubt that the accused had inserted his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.*
>
> *27. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with...*
>
> *28. As a matter of law, I have to direct you that an offence of sexual nature as in this case does not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant."*

[49] Immediately after his summation of the Defence case, the learned trial judge addressed the issue of inconsistencies in the evidence of the prosecution witnesses at paragraphs 93 to 97 of summing-up, pages 97 and 98 of Record of High Court. At paragraph [98] of summing – up, after discussing the Prosecution case, the learned trial judge stated:

> *"98. At the end of prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times. He could have remained silent but he chose to give evidence and be subjected to cross-examination."*

[50] The assessors had correctly reacted to the summing up, hence the unanimous verdict of not guilty. The learned judge in overturning the unanimous opinion of the assessors, failed to provide cogent reasons as required by statute. The Court of Appeal, in paragraphs [26] to 28] of its judgment simply accepted and adopted the learned trial judge's conclusions, without conducting an independent evaluation and assessment of the evidences. In paragraphs [11] to [19], of the High Court judgment, there are no cogent explanations, reasons, justifications of how the learned trial judge had arrived at the findings and conclusion had pronounced.

[51] This ground is arguable. Under the circumstances, the requirements under Section 7(2) of the Supreme Court Act are met.

GROUND 3: Did the Court of Appeal erred in law failed in not giving his reasons as did the trial judge for not agreeing with the assessor's opinions when confirming the verdict and that the guilty verdict is unreasonable and cannot be supported having regard to the evidence resulting in a substantive and grave injustice to the petitioner.
Section 237 of Criminal Procedure Act

[52] The requirements of section 237(4) and (5) of the Criminal Procedure Act sets out the requirements that a trial judge must comply with, where, the trial judge had overturned the unanimous opinions of the assessors. There are no reasons given by the trial judge, for differing with the majority opinion. He relied only on his belief and on the complainant's and prosecution's version of the events, and accepting that as the truth. He did not provide any reason nor explanation, nor justification. The judgment does not contain any indication that the conclusions he had arrived at, with regard to the critical issue of consent, or any other issues, were arrived at after careful, and critical analysis, assessment and evaluation of the evidences before the court.

[53] While it is accepted that, the learned trial judge cannot be expected to repeat all that he had said in the summing-up for inclusion in the judgment, and as he indicated at paragraph

3 of judgment that he directs himself with his summing - up and the evidence adduced at trial; on the other hand, he had a statutory obligation, that he shall give reasons for differing with the majority opinion, as required by section 237(4). Further, section 237(5), states that:

> *"5. In every case the judge's summing up and decisions of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of court for the all purposes."*

[54] The Petitioner's contention is that the trial judge had not given cogent reasons for overturning the unanimous opinions of the assessors. Meaning, that the trial judge had not followed the guidelines and principles established by case law, as to the extent of his obligations to give reasons. The summing-up was comprehensive, and the assessors have responded by returning a unanimous opinion of "*Not guilty*". In light of that, the onus on the trial judge to provide cogent reasons for overturning the assessors' unanimous opinion, is critical.

Issue of Consent Inconsistencies

[55] The only issue at the trial was that of consent. The prosecution's case was based on the evidence of the complainant and Jone Namakadre. The trial judge had summerised the evidence of the complainant in paragraphs 30 to 62 of the summing-up, in which several inconsistencies, contradictions and omissions had been brought to the surface by the defence as highlighted in the summing up. These are detected in the evidence of the complainant regarding her version of the chain of events prior to the alleged rape, matters associated with the act of rape itself and after the alleged rape. These occurrences of such inconsistencies, contradictions and omissions will not be itemised, however, the learned trial judge had referred to them in paragraphs 44, 46, 48, 49, 52, 54, 55, 57 and 58 of the summing up.

[56] As for the evidence of Jone Namakadre, the learned trial judge had referred to different versions of his narrative in the police statement and his testimony in court, in the

summing-up at paragraphs 79, 80, 84, 85, 90 and 91. Two persons referred to in the evidence adduced at trial, namely, Ashneel Kumar (the complainant's boyfriend), and the "*elderly man*" in the sitting room at the material time, who could have shed light on what transpired in that night was not called by the prosecution nor by the defence. There appear also to be some inconsistencies, contradictions and omissions between the testimony of the complainant and Jone Namakadre.

[57] Turning to the petitioner, his evidence had been summarised in paragraphs 99 to 112. It is the petitioner's case that he had invited the complainant to his house with the intention to have sexual intercourse and she had agreed and once inside the house the complainant had come to his bedroom when requested by the Petitioner to have sex with him, and both had consensual sexual intercourse.

[58] Doctor Nabaro's evidence, when called by the petitioner as witness, are highlighted in paragraphs 113 to 121 of the summing-up. The doctor had not found physical evidence of sexual intercourse when examining the complainant who was calm at the examination on the day of the alleged incident. He did not observe any bruising or swelling on the complainant's thighs despite three hard punches allegedly delivered by the appellant causing unbearable and intense pain.

[59] The assessors were given very comprehensive directions on how they should evaluate and decide on the reliability and credibility of evidence before them, in order that they are assisted to determine, the guilt or otherwise of the accused/petitioner. The directions are in paragraphs 162 to166 of the summing-up.

[60] In his judgment, the learned trial judge had again summarised the evidence of the prosecution and defence (at paragraphs 5 to 11 of his judgment), and explained the inconsistencies, contradictions and omissions in the complainant's and Jone Namaadre's versions on the basis that 2 years has passed since the incident happened and the time gap could have affected their memory (at paragraph 12 of judgment). How did he arrive at the conclusion?

[61] Both the complainant and Namakadre had previously made Police Statements, which they were confronted with at the trial. Both had insisted that that the evidence that they are telling in Court was the truth. The witnesses, could have corrected themselves if it were a case of lapse in memory. They could have forgotten certain aspects, and be reminded, so that they could correct themselves. The effect is serious as in some instances, the complainant had admitted she had lied to Police but did not explain why she gave a false version to the police. An in fact she had once admitted that she had told in examination in chief was wrong. One would not expect the witness to be human tape recorders. However, the structure/basis/foundation of their story should be consistent unless reasonably explained.

[62] As earlier stated, the learned trial judge found those inconsistencies, contradictions and omissions to be insignificant without explaining why he had come to the conclusion. As they could have a direct bearing on the crucial issue of consent. It is difficult to ascertain the basis of the judge's assertion in the judgment that the complainant was able to withstand cross-examination in light of several inconsistencies, contradictions and omissions highlighted in cross-examination where in one instance she had admitted giving wrong evidence in examination –in-chief. As such, the basis to treat the complainant's evidence as truthful and reliable by the trial judge is not made clear in the judgment.

[63] The learned trial judge had not found the appellant to be telling the truth. Again, he did not give any reasons as to why he had come to the conclusion. He had posed a question, whether the appellant would have invited all the group members including the complainant to come to his house if he was going to have sexual intercourse with her. It is in evidence that two of the group members (a male and a female) had already gone to one bedroom after their arrival indicating that the group members had gladly accepted the appellant's invitation to go to his house. On the other hand, one might also argue that the appellant would not have invited the whole group home if he was going to have forcible

sexual intercourse with the complainant and done so in the face of resistance witnessed by Jone Namakadre providing perfect evidence against the appellant.

[64] Notably, I cannot find from the summing-up or the judgment that the prosecution had managed to demonstrate any inconsistencies, contradictions and omissions in the appellant's version of events.

[65] The trial judge treated the Doctor's evidence that he saw a bit of blood on his examination gloves as evidence of forcible penetration. In the light of the Doctor's inconclusive evidence the inference cannot be justified.

[66] After setting out the facts as adduced in evidence, the trial judge at paragraph 11, indicated that both witnesses for the prosecution were referred to their Police statements during the trial, and both agreed *"that there was a difference between the version they had told the Police when everything was fresh in their mind and the version they had told the court.* "The learned trial judge attributed the inconsistencies in Prosecution witness's evidences to *"passage of time can affect one's accuracy of memory and I note the alleged incident happened some two years ago*."- see paragraph 12 of judgment at page 79 of Record of High Court. Further, he found "*the inconsistencies were not significant which had adversely affected the reliability and credibility of the complainant and the other prosecution witness in what had happened at the house of the accused."*

[67] The learned trial judge agreed with the version of the complainant as the truth, on the actual commission of the offence of rape (paragraph 14). He had no doubt that the complainant told the truth in court. That she reported the matter promptly to the Police, and had been medically examined by a doctor who was an expert witness. He stated *"The Doctor did not state that the complainant was menstruating when he examined her hence I am inclined to accept that the blood seen by the Doctor was as a result of force used."*- see paragraph 16 of judgment at page 80 of Record of High Court.

Court of Appeal

[68] The Court of Appeal's reasoning can be seen above –see paragraphs [18] to [24] of this judgment above. The Court agreed substantially with the reasoning and supported the decision of the High Court in believing and accepting as credible and reliable the evidence of the witnesses for the prosecution. The Court's judgment did not explain in a sound and cogent manner, why it had agreed or accepted the learned trials judgment and findings without undertaking a proper evaluation and assessment of the evidence and findings, especially in view of the numerous inconsistencies, contradictions and omissions already highlighted.

[69] The ground is arguable and has merit. It meets the requirement under section 7(2) of the Supreme Court Act.

GROUND 4: Did the Court of Appeal erred in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence resulting in a substantive and grave injustice to the petitioner.

[70] I have analysed the Court of Appel's decision (per Nawana, JA), who appeared to have analysed and assessed the evidence adduced at the trial and the decision of the learned trial judge , and agreed with them .The issue is whether the Court of Appeal had evaluated and assessed independently the findings and conclusions of the learned trial judge. I go along with the learned single judge, in concluding that, the task of the Court of Appeal in this appeal is to determine whether the trial judge's judgment had properly focused on the weight of the evidence and reflected correctly as to the credibility of witnesses and whether the reasons given to disagree with the assessors are capable of withstanding critical examination in the light of the whole evidence presented at trial. These are questions of mixed law and facts which should be considered by the Court according to the principles set out in section 23(1) of the Court of Appeal Act. In my view and

assessment, he Court of Appeal, in its judgment, had failed to do that. This ground is arguable. Section 7(2) of the Supreme Court Act is applicable.

Conclusion

[71] In consideration of the above discussion and analysis, I hold that the appeal does meet the requirements of Section 7(2) of the Supreme Court Act, in that the verdict is unreasonable, cannot be supported having regard to the evidence or any ground of miscarriage of justice. In terms of section 14 of the Supreme Court Act, and particularly section 23(1) (a) of the Court of Appeal Act, the petitioner's application for enlargement of time is granted. The appeal is allowed and the conviction quashed.

Orders of the Court:

1. *Application for Enlargement of time allowed*
2. *Special Leave to appeal granted.*
3. *Appeal is allowed*
4. *Conviction is quashed and petitioner is acquitted.*

Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

Hon Justice Terence Arnold
JUDGE OF THE SUPREME COURT

Hon Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT