IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0016 of 2023
[Court of Appeal No. AAU 011 of 2019]

BETWEEN	:	**ISOA RAINIMA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Anthony Gates, Judge of the Supreme Court**
		The Hon. Justice William Calanchini, Judge of the Supreme Court
		The Hon. Justice Terence Arnold, Judge of the Supreme Court
Counsel	:	**Petitioner in person**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**14, 21, and 22 August 2024**
Date of Judgment	:	**30 August 2024**

JUDGMENT

Gates, J

[1] This petition is focused chiefly on the identification evidence at the trial. The charges of rape, assault with intent to commit rape, sexual assault, criminal intimidation, and robbery arose from a daylight attack on a 23 year old university student walking along Holland Street, Suva. The perpetrator subjected the victim to an hour long period of captivity and torture, in an area of rough ground away from the public eye, where these offences were committed on her.

[2] On the 25th of October 2018, the petitioner was convicted after trial at the Suva High Court. The offences were committed on the 30th of December 2016. In total his sentence amounted to a term of imprisonment on the rape charges of 23 years with a non-parole period of 20 years.

[3] The petitioner filed an appeal against conviction and sentence with the Court of Appeal. This was out of time by 65 days or approximately 2 months. The single judge refused the application for enlargement of time. The petitioner re-applied to the Full Court, which also refused enlargement.

[4] On the 17th of October 2023 the petitioner lodged a petition to this court. His grounds do not deal with this issue, for first he must succeed in demonstrating that he should have been allowed the enlargement in the court below. In a 32 page judgment the Court of Appeal canvassed his grounds before determining his application and refusing the appeal.

[5] On the first hearing date before us the petitioner was not in a position to argue his case. He had been moved to a different part of the Correction Center and was without his papers. We allowed him an adjournment to prepare further written submissions and an oral argument. The hearing proper then took place on the 22nd of August 2024.

[6] The petitioner had appeared for himself before the single judge below and before the Full Court of the Court of Appeal. He appeared in person before us. He appeared well aware of his case and the record. Orally, he indicated parts of that record that he said assisted his appeal. His submissions were well written and he conducted his case intelligently and competently both in the written submissions and orally.

The Facts

[7] On the 30th of December 2016 at around 10am the complainant was walking along Holland Street towards Knolly Street. This was a bright sunny morning. A man came from behind and shoulder tackled her. He threw her over the metal railings. She fell 2 meters down a slope.

[8] The following continues in essence the account set out in the Court of Appeal's judgment:

> *"[4] ….The appellant had then jumped in after her and landed beside her and thrown several heavy punches to her face and head. She had cried out aloud to raise the alarm, but it was to no avail. Her left eye had become swollen, and she had a cut also below the left eye. The appellant had sworn at her, and threatened her not to 'misbehave'. The appellant forced her down the slope, and taken her through a tunnel below Holland Street. He had forced her to the other side, facing Wainibukalou Creek. He had stripped her naked.*
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> *[5] The appellant then forced her to a flat surface and licked her vagina (count no. 9) and later inserted his tongue into her vagina (count no. 5). Then the appellant had forcefully marched her downstream. On the way, he had forced her to a number of flat surfaces, and repeatedly raped her, as alleged in counts 2, 3, 4, 5, 6, 7 and 8 and severely dominated, subdued and threatened MS into submission. He had also sexually assaulted her (count no. 9), repeatedly intimidated her (count no. 10), and stolen her properties (count no. 11). All the acts of the offending had been committed without MS's consent and in the course of them he had forced her to suck his penis, inserted a finger and small stick into her anus, inserted 05 fingers and his penis and thrust a big stick into her vagina and later strangled her with some nearby bush vines and stomped her head. He finally whacked her head three times with a big stick, and left her for dead exhibiting extreme cruelty. He also took close photographs of her vagina and anus in between at different angles and at one stage wanted to insert a pipe into her vagina. Her cries for help went unanswered and pleas for mercy were met with more abuse, contempt and brutality by the appellant. She came close to death on more than one occasion during the ordeal that lasted for an hour. Medical evidence showed the extreme trauma MS had undergone. There was distress evidence coming from MS observed by the doctor. MS was determined to remember her attacker's face to bring him to justice in case she survived. She identified him at two photographic identifications and at a formal ID parade where she struggled to hide her emotions."*

Grounds

[9] The petitioner informed us at the outset that he was only pursuing six of his grounds. These he had addressed in his latest written submission brought to the hearing and in his oral submissions.

Ground 1 – Police custody in excess of 48 hours

[10] The petitioner alleged that the police investigation was procedurally flawed and had been prejudicial to his rights. He had only been arrested for some minor thefts and burglaries in his neighbourhood on the 9th of February 2017, he said, but that he had been kept in custody whilst they carried out their investigation into the rape case. He said he was not informed of this new investigation. He was therefore kept in custody beyond the 48 hours period in violation of section 13 (1) (f) of the Constitution.

[11] In order to set up such a ground there must exist evidence in the trial that provides the platform for such an allegation. There was none. None of these allegations were elicited either in examination in chief or through cross-examination of the prosecution witnesses. The petitioner exercised his right to remain silent. So there was no evidence from the defence side as to what had happened, or for how long he had remained in custody, or what he had been told. Disclosure documents, if not exhibited in the trial, are not evidence. So we are left with no evidence on this point. The necessary founding evidence could have been elicited by the defence in the cross-examination of the police witnesses. The judgment in the Court of Appeal went into the law on this ground. But the point was not a litigation issue. Nothing more need be said on it. The ground fails at the outset.

Ground 2 – Handling of photos for identification and need for further directions on inconsistencies

[12] The petitioner frames this ground by saying the judge should have warned himself and the assessors about the "lies by prosecution witnesses". This complaint is more akin to the need to point out inconsistencies in the evidence of the identifying witnesses.

[13] The first issue was the two sets of photographs put to the complainant on the 10th of February 2017. She pointed out the petitioner in one of the photographs. One set was shown first. After a few minutes a second set was shown. Later, on the 13th of February 2017 she attended a

police identification parade at the Totogo Police Station, and identified him again. In the first set of photos she identified photo 11 and photo 5 in set No. 2.

[14] Detective Sergeant Salote Vuniwaqa [PW2] said she was responsible for selecting the photographs. She said one set was shown to the complainant on the 9th of February 2017 and the second set on the 10th of February 2017. For the second set she said they travelled to the Naqali Police Post, and in a room there, she showed them to the complainant. There was a slight inconsistency here on the date.

[15] The Court of Appeal had this to say:

> *"[22] This court would only look at the trial proceedings and not the disclosures at this stage unless they had been in one way or the other brought to the main body of the trial. Parties are not allowed to raise appeal grounds and make submissions on matters never raised at the trial stage, for witnesses should be confronted with and given a chance to explain, if possible before being discredited. This is the only way a fair trial could be achieved in an accusatorial system such as ours.*
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> *[23] On the other hand, even if the appellant's submission is credible, he has not shown how that inconsistency affect the credibility of the photographic identification made by MS according to whom she twice identified the appellant among different photographs (the only photograph featuring in both sets was that of the appellant) shown to her by PW2 on 10 February 2017. It appears that PW2 had made an error as to when the photographic identifications exactly took place."*

[16] After delivering the summing up the judge asked both counsel, in the presence of the assessors, if any re-directions were required. Defence counsel drew the judge's attention to the evidence of two witnesses whose identifying features of the culprit had differed, and that these differences should be referred to. These differences had concerned where in the mouth of the suspect the gold tooth was sited. The complainant had said the gold tooth was at left upper, whereas PW10 Masitoki had said the petitioner had a gold tooth at right upper.

[17] The judge agreed with the request. He directed the assessors to take on board the matters raised by counsel and to "please note down". He asked defence counsel if he had anything further to add, and counsel said he had nothing further.

[18] The petitioner mentioned the medical report on himself, and the original statement of the complainant recorded by the police, as assisting his case. They could not. Neither document was referred to in the trial or exhibited. They were not incorporated into the evidence and thus could not be considered. Trials are to be conducted with fairness. Guilt or innocence is to be decided on the evidence presented in the trial, and not on external material.

[19] The inferences, as suggested by the petitioner, to be drawn from the inconsistencies over the first date of showing photo set No. 1 do not lead to a conclusion of impropriety. It was never suggested in cross-examination that PW2 had guided the complainant into identifying a certain photograph from the two sets. Nor did this form part of the defence case at trial. There was significant evidence, which PW1 herself gave, as to why she remembered his face, eyes, build, complexion, as well as his tattoos and his gold tooth. Such observations were gained over an harrowing hour, and whilst sighted in close up. The judge had given the assessors the appropriate warning as to how to assess and to weigh identification evidence.

[20] PW2 in her evidence in chief said, by way of explanation to the complainant, when photo set No. 1 was shown to her, "that the photos are photographs of certain people that we think allegedly committed the offence." No criticism was made in cross-examination or in defence counsel's closing address. The introductory explanation of the complainant's task might have been expressed in more neutral language, such as "is there anybody in this set of photographs that you recognised?." But this is not a criticism of substance, and it does not undermine the validity of the identification that followed.

[21] The question of which part of the dental mouth exactly sat the gold tooth or cap, could have turned on what had made the tooth noticeable. It must be assumed that its existence and prominence was noticeable to others not because of its exact place within the mouth, but because its gold nature and colour stood out and glinted. One of the two witnesses may have been not strictly accurate in saying the tooth was to the left or to the right. It was sufficient for the two witnesses to be aware that the petitioner at the time "had a gold tooth".

[22] Dr. Jone Domoni [PW9] was a qualified dentist with 32 years practice experience in general dentistry. On the 13th of February 2017 he was asked to examine the petitioner's mouth and

teeth at Central Police Station. He brought along with him his dental appliances. The petitioner willingly agreed to the examination.

[23] Dr. Domoni testified:

> *"I found that the upper left canine was clearly shaped and something was earlier placed there. It cannot be a filling. It was something cosmetic. It can either be gold or silver, which is a common practice here in Fiji.*
>
> *It could be gold or silver filling that was put over the tooth surface. I confirmed the above via the shape of the tooth. The shape of a canine is pointed, but the shape of canine has a flat biting surface. Some work had been done to level that tooth surface. I can confirm that there was a gold or silver tooth in the person's upper left canine tooth. I can confirm that this upper left canine tooth had been removed, at the time of my examination."*

[24] The complainant's evidence that the man who did these things to her that morning had a gold tooth on the left side, had some support in saying it was on the left side, from the dentist's evidence. If the petitioner originally had a gold tooth that was correctly noted by the complainant on the 30th of December 2016, it had been removed prior to the 10th of February 2017. The complainant is also supported by Sakiusa Masitoki [PW10] in so far as he also noticed the petitioner had a gold tooth. He said, as already noted, that it was on the upper right of his mouth. The petitioner had been staying with Masitoki for about a month. Masitoki could not have been mistaken therefore about the existence of the gold tooth on Friday the 30th of December 2016. His Lordship concluded Masitoki was an honest and credible witness. The defence did not cross-examine him, nor challenge his evidence in any way.

[25] Significantly Masitoki saw the petitioner coming home to Nanuku, Vatuwaqa at 6am on the 30th of December 2016. There was no mention of the petitioner's girlfriend, DW1 Inise Liku being present then. At 10am Masitoki had finished cleaning the house. The petitioner was no longer there at that time. But he saw him again at 3pm, this time with Liku. Liku denied this. She said she and the petitioner were all day at Wairua, Tamavua for celebrating the New Year. The exact address was not specified. Masitoki did not see the petitioner again after the 30th December 2017.

[26] Liku said they came back to Nanuku after the week's celebrations. In cross-examination she denied that the petitioner had a gold tooth. She accepted he had tattoos on his right arm. She denied meeting Masitoki at 3pm on the 30th of December 2017. If the assessors and the judge disbelieved Liku on the non-existence of the gold tooth and on her denial of meeting Masitoki at 3pm on the 30th of December 2017, it would be unlikely they would accept her alibi evidence for the petitioner that she and he were together at Tamavua on the same morning. The question to be proved by the prosecution was clearly put by the judge in his summing up.

Ground 6 – Ineffective canvasing of Defence Case

[27] The petitioner referred in his submissions, specifically to the evidence of DW1 Inise Liku concerning the gold tooth and the petitioner's whereabouts, which evidence could support his alibi.

[28] This point has already been covered in earlier discussion. The judge had reminded the assessors of the evidence given by the petitioner's only witness DW1. He also dealt with the petitioner's right to remain silent, and directed them on how that was not to be held against him. At paragraph [29] his Lordship said:

> *"29. Remember, the burden of proof stays on the prosecution throughout the trial and it never shifts to the accused, at any stage of the trial. So, when he chose to remain silent, he is calling, by conduct, on the prosecution to prove his guilt beyond reasonable doubt. That was his constitutional right. And as such, nothing negative whatsoever should be imputed to him for choosing to remain silent, because he was merely exercising his right."*

[29] As result of discussions between defence counsel and the judge, other issues raised by the witness DW1 Liku and PW10 Masitoki were brought to the attention of the assessors. Those issues included the weight to be given to their respective pieces of evidence, and the difference in time each witness had spent with the petitioner in order to observe his appearance [1 hour with PW1, and 1 month with Masitoki].

[30] The evidence of Masitoki and Liku would have been comparatively easy for the assessors to grasp and to compare. They gave their evidence one after the other, save for the interposition of the doctor's evidence who treated the complainant at the hospital. This evidence was the final part in the trial. The judge summed up after closing addresses. The details of the short evidence which each witness had given would therefore have been fresh in their minds. The judge's summary together with the re-directions were sufficient guidance here. This ground fails.

Ground 9 – Defective Audio unfair to the petitioner

[31] The Court of Appeal had this to say about the lack of quality in the audio recording of the earlier part of the trial:

> *"[58] It appears from the record that for the first to third day of the trial, the audio recording had been either not clear or inaudible but from the fourth day it was available. This was the same for both parties. However, the trial judge had made detailed notes of all proceedings on the first three days. Entire cross-examination of MS, PW2 and other important prosecution witnesses had taken place on or after the 04th day of the trial and their evidence had been audio recorded in addition to judge's notes."*

[32] The petitioner says he was handicapped not knowing what questions had been put to the complainant by the prosecution. He needed this so that he could challenge the questions on appeal, perhaps for "some defects or leading question on the evidence".

[33] The petitioner was represented by counsel. On occasions he had objected to a leading question further on in the trial. He was fully capable of making suitable objection during the course of PW1's examination in chief. This appears not to have caused a problem, though the malfunction of the audio was unfortunate. If there had have been an objectionable question counsel was not prevented for making that objection. No prejudice has been caused here. This ground fails.

Ground 10 – Failure to assess prosecution witnesses and give precise warnings

The DNA evidence

[34] Several matters are put into this ground through the petitioner's submissions. For instance, he makes complaint about the DNA evidence. This takes his defence nowhere. The DNA was presented as a matter of fairness only by the prosecution. It did not link him to any item at the crime scene. It was therefore irrelevant to the question of guilt. In fact, it was more favourable to the defence in that it had failed to prove that he was at the scene or had used or handled any of the items.

[35] There was no pursuit by defence counsel to suggest the DNA evidence could establish that someone else was the culprit. The judge summed up this part of the case at paragraph [35]:

> *"[35] Prosecution Exhibit No. 5 provides you with scientist Naomi Tuitoga's (PW6) police statement, and her Forensic DNA Report. DNA matters were considered during the trial. However, the prosecution was unable to provide any DNA evidence to link the accused to the alleged crimes in the information. If anything, the prosecution's DNA report appears to clear the accused's presence from the crime scene, at the material time. Of all the items from the crime scene analysed, they could not obtain the accused's DNA sample from the same. The DNA report was unhelpful to the prosecution's case. Why they called the same in the trial, somewhat battles me."*

[36] The judge put the DNA evidence into context. The prosecution in the presence of the assessors had informed the judge they would not be relying on DNA evidence to identify the petitioner as the person responsible for the crime. This part of the ground fails.

[37] The petitioner submits the judge should have looked at his caution interview statement and then he would have seen the elements of the defence had not been established. He refers also to the statement of PW1 as first recorded by the police. The judge can only look at the evidence adduced before the court. Neither of these documents were exhibited and therefore they could not be considered. It would have been for the defence counsel in his cross-

examination of the relevant police witnesses to provide a basis for the documents to form part of the evidence.

[38] Similarly, the petitioner submitted comments on the evidence of tattoos in comparison with PW1's police statement. Mention was made also of Masitoki in dealing with a removable sleeve tattoo. The petitioner made comparisons with their out of court statements. Again these had not been introduced into evidence by his counsel. The petitioner also submitted facts about his own tooth, said to be different from the witnesses' testimony in court. He, no doubt upon considered advice, had elected not to give evidence. It is not possible for him now to seek to get his own evidence in on these matters, in effect giving evidence post trial and without having to go into the witness box. This is not permissible.

[39] This ground fails.

Ground 1 – Double counting in Sentence

[40] It is well established that it is the ultimate sentence rather than each step of the reasoning process that must be considered, and whether in all the circumstances of the case the sentence is one that could reasonably be imposed: ***Koroicakau v The State*** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

[41] In considering the circumstances here Prematilaka JA in the court below said at paragraph [85]:

> *"[85] In fact, the absolute horrific experience MS faced on this eventful day for about an hour is much more than the sentencing judge had managed to put down in writing under aggravating factors. Perhaps, one could picture the ordeal only by reading the full transcript of MS's evidence. It shocks the conscience of any human being, for her attacker's conduct and behavior was sub-human and beastly which the trial judge described as the worst that he had seen in his 24 years on the Bench. According to the doctor, this was one of the worst cases of rape that had come before her and MS was one of the most traumatised patients she had ever seen. Worst, according to MS all the time the attacker was sober. Her evidence suggests that he acted rationally and carefully calculated all his moves."*

[42] The sentencing judge in the High Court noted the pre-planning, the level of violence and brutality, and the physical and psychological injuries to the complainant. The petitioner, according to the complainant was sober throughout, making the crime particularly cold blooded and sinister. When the complainant was taken to hospital at 3.50am in the morning of the 31st of December 2016 and taken to the operating theatre she was observed by the doctor to be "distressed, shouting, and worried….until she became unconscious". There was evidence from the perineal examination that there had been a forced entry of a foreign object into the vagina and anus.

[43] The prosecutor could have filed an information charging one count of rape only. All of the counts presently charged could have been circumstances of aggravation in this hour long ordeal. Individual charges were decided upon. Inevitably the horrendous events could therefore have amounted to a certain amount of double counting. In this case that is of no consequence. The same sentence for one count of rape would have attracted the same level of condign punishment as in the way the judge structured the sentence here with several counts.

[44] This was a rape of the worst type. A sentence well outside of the usual tariff of rape of an adult was therefore justifiable, necessary, and correct. Such horrendous cases are not the norm. Its features demanded an unusually severe sentence. Overall, applying the admonition to stand back and to consider its appropriateness as a sentence to fit the characteristics of the offending, it must be considered fitting. It was completely proportionate.

[45] There was no mitigation.

[46] The judge was generous to allow a discount here for the time spent on remand. The Court of Appeal was correct in refusing enlargement of time within which to appeal, and in dismissing the appeal.

Calanchini, J

[47] I have read in draft from the judgment of Gates J and agree with his reasoning and conclusions.

Arnold, J

[48] I have read the judgment of Gates J in draft and agree with the orders he proposed for the reasons he gives.

Orders of the Court:

1. Leave refused.
2. Petition dismissed.
3. Conviction and Sentence affirmed.

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Justice William Calanchini
JUDGE OF THE SUPREME COURT

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JUDGE OF THE SUPREME COURT

Solicitors:

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