IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0043 of 2023
Court of Appeal No. AAU 0003 of 2019

BETWEEN: **ANANAIASA QAQATURAGA**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Justice Salesi Temo**
President of the Supreme Court

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

Counsel: **The Petitioner in person**
Mr M Vosawale for the Respondent

Date of Hearing: **7 October 2024**

Date of Judgment: **30 October 2024**

JUDGMENT

Temo, P

1. I have read Justice Keith's draft judgment, and I agree entirely with his reasons and conclusions

Gates, J

2. I agree with the judgment of Keith J and with his reasoning and orders.

Keith, J

Introduction

3. Until recently, defendants who were tried in the High Court were tried by a judge sitting with assessors. Each of the assessors would express an opinion on the guilt or otherwise of the defendant, and the judge was required to take their opinions into account. But he did not have to agree with them. He could acquit a defendant even if the assessors expressed the opinion that the defendant was guilty, and he could convict the defendant even if the assessors expressed the opinion that the defendant was not guilty. The judge had the final say about whether the defendant was guilty or not.

4. In this case the three assessors all expressed the opinion that the defendant, now the petitioner, was not guilty. The judge took a different view. He convicted the petitioner. On the petitioner's appeal to the Court of Appeal against his conviction, it was argued, among other things, that the judge had not given sufficiently cogent reasons for disagreeing with the unanimous opinion of the assessors. The Court of Appeal concluded that the judge's reasons were sufficiently cogent, and they dismissed the appeal. The petitioner now applies to the Supreme Court for leave to appeal.

5. The petitioner is Ananaiasa Qaqaturaga. I shall refer to him as Ananaiasa in accordance with the usual practice in Fiji. He was charged with rape. He pleaded not guilty. The complainant was the daughter of his cousin and was 17 years old at the time. Her anonymity has been preserved, and she was called MS at the trial. Ananaiasa was alleged to have raped her on 15 October 2016. His trial took place at the High Court in Suva before Hamza J in December 2018. MS was then 19. Following his conviction, Ananaiasa was sentenced to 13 years and 9 months imprisonment with a non-parole period of 11 years and 9 months.

The evidence

6. The case against Ananaiasa was based entirely on MS's evidence. Her evidence was that at the material time she was living at home with her parents and siblings in a village on the island of Gau. Ananaiasa had a shop a couple of minutes walk away from their home. On the morning of the day in question, MS's mother had asked her and one of her sisters to go to the shop and buy some butter. They did that, and while they were there Ananaiasa asked her to come back later to wash his clothes as his wife was away in Suva. He had never asked her to do that before. He said that he would pay her. When MS got home, she told her parents what Ananaiasa has asked her, and they told her that she could.

7. When MS returned to the shop, Ananaiasa was sitting on the verandah in front of the shop with his daughter who was 12 years old. There were two other women there. They were both teachers. They were drinking grog. MS went into the house which was behind the shop. She swept the living room, and Ananaiasa's daughter joined her there. While MS was in the living room, Ananaiasa brought them something to eat. She then went to the bathroom to wash his clothes. While she was doing that, one of the teachers came in to use the toilet, and Ananaiasa came in and gave her $15. After washing them, she returned to the living room to hang them up. Ananaiasa's daughter was still there, and Ananaiasa asked her to look for his phone at another house. She left, and MS returned to the bathroom. While she was there, Ananaiasa came into the living room and closed the curtains. He then

came into the bathroom with some oil and asked her to massage his head, telling her that he had a headache. She did so. He also asked her whether she wanted to smoke.

8. It was at that stage that Ananaiasa began, to use MS's own words, to "harass" her. He pushed her against the wall and took off his T-shirt. He then pulled her sulu away and pulled down her knickers. She began to scream, but he covered her mouth with his hand. He tried to insert his penis into her vagina. She was crying. Eventually he did so. She knew that it went in because it was painful. They were both still standing up and facing each other. It lasted for about 5 minutes. She had been trying to push him away, but had not been able to. Eventually he let her go, and she ran to where her cousin lived, as that was closer to the shop than her own home. She was asked by Ananaiasa's counsel why she had not stopped to tell the two teachers what had happened. Her response was that she had not been paying attention to the people there and had wanted to get to her cousin first. Her evidence was that she had told her cousin what had happened. While MS was there, her mother arrived. MS was not able to tell her mother what had happened, but her cousin told her mother what MS had told her.

9. MS's cousin also gave evidence, as did MS's mother. MS's cousin's evidence was that she and MS were "best friends". On the day in question MS had come to her home. MS looked frightened. She said that Ananaiasa had tried to take her clothes off so that they could "stay" together. She understood MS to mean that Ananaiasa wanted to sleep with her. After a while MS's mother arrived, and MS's cousin told her what MS had said.

10. MS's mother in her evidence confirmed giving MS permission to go to Ananaiasa's home to wash his clothes. Her evidence was that when MS had not returned home, she went to look for her. She saw MS coming from Ananaiasa's home towards her, but when MS saw her, MS turned to go into her cousin's home. She followed MS in. MS was crying, and MS's cousin told her that MS had said that Ananaiasa had "harassed" her. So MS' mother asked MS what Ananaiasa had done to her. She just kept on crying. They then went home. She kept on asking MS what Ananaiasa had done to her, and all she said was that he had

harassed her. The only thing which she had added to that was that he had shut her in the bathroom, had held her and had tried to take off her clothes.

11. There was contradictory evidence about when the police became involved. MS's mother said that the matter had been reported to the police on 17 October 2016, whereas MS said that her mother had reported the matter to the police on 28 October 2016. There was evidence that MS had been examined by a doctor. No evidence was given as to when that was, nor was the doctor called to give evidence, nor was his report exhibited. In the course of her evidence, MS's mother said that the doctor had told her that MS had told him "everything". That was obviously not admissible, and the judge rightly told the assessors to ignore it. But MS's mother also said that MS had told the doctor that she did not want her parents to know about what had happened as Ananaiasa was a relative of theirs. That too was not admissible, but the judge recorded that Ananaiasa's counsel had no objection "to this answer going in". For his part, Ananaiasa elected not to give evidence, and no other evidence was called on his behalf.

The closing addresses

12. In her closing address, counsel for the prosecution made the point that no reason had been advanced by the defence for MS to have falsely accused Ananaiasa of raping her. For her part, Ananaiasa's counsel made the point that if MS had really screamed, someone would have heard her as the verandah in front of the shop was not far away from the bathroom. She added that it would have been impossible for Ananaiasa to have prevented her from screaming for the length of time which MS said the rape had gone on for. She claimed that it was not physically possible for Ananaiasa to have raped MS when they were both standing up. She said that there had been a long delay in reporting the matter to the police. And she stressed the point that MS had not told either her cousin or her mother that she had actually been raped. The most she had said about the form which the harassment had taken was that Ananaiasa had shut her in the bathroom, had held her and had tried to take her clothes off.

The judge's judgment

13. The judge regarded the absence of any motive for MS to have falsely accused Ananaiasa of rape as highly significant. He thought it "highly unlikely" that the people sitting on the verandah would have heard any screams coming from the bathroom in the light of what he thought was the distance between the verandah and the bathroom. He disagreed with the suggestion that it was impossible for Ananaiasa to have been able to insert his penis into MS's vagina when both of them were standing up – despite what he took to be their respective heights at the time. He did not regard it as significant that MS had not told the two teachers on the verandah what had just happened to her. As the judge said:

> "It is highly improbable to expect a teenage girl, who has just been subjected to a serious sexual assault, to be informing almost total strangers (although the complainant said she knew one of the teachers) about the incident, and that too, to persons who were consuming kava at the time, at the accused's own premises."

The judge did not attempt to resolve the conflicting evidence about when the police became involved. Instead, he referred in his judgment to Ananaiasa's counsel's contention that there had been a long delay in reporting the matter to the police. He said that the prosecution had explained the reason for that, and added that he regarded the delay as "justifiable".[1] But whatever the reason had been, the fact was, as the judge pointed out, that MS had complained about Ananaiasa very shortly afterwards to her cousin. It was for all these reasons that the judge was sure of Ananaiasa's guilt. He described the opinions of the assessors as "perverse".

14. Two other things should be noted. First, the judge was alive to the fact that what MS had told her cousin and later her mother did not amount to corroboration of her account. It could only show that her account in court was consistent or inconsistent with what she had said shortly after the incident. That is apparent from the judge's summing-up to the

[1] I have not found any reference to the prosecution's explanation for the delay in the High Court record.

assessors. Secondly, it should be noted that the judge did not refer to the fact that neither MS's cousin nor her mother had said that MS had told them that Ananaiasa had put his penis into her vagina or even that she had been raped – a point which Ananaiasa's counsel had stressed. I shall return to that later.

The appeal to the Court of Appeal

15. Ananaiasa appealed to the Court of Appeal. He drafted the notice of appeal himself, but in due course, a lawyer from the Legal Aid Commission was instructed, and an amended notice of appeal was filed. The single ground of appeal was that the judge "had erred in his analysis of evidence and in convicting the Appellant when the evidence in totality does not support the charge of rape". In the written submissions drafted by counsel in support of the appeal, reliance was placed on three matters: the delay in getting the police involved, the unlikelihood of penetration being achieved when both MS and Ananaiasa were standing up, and the fact that MS's cousin and mother had not said that MS had told them that she had actually been raped.

16. Prematilaka RJA refused leave to appeal. Ananaiasa renewed his appeal to the Full Court. He drafted the notice of renewal himself, as well as two sets of written submissions in support of his appeal. Again, a lawyer from the Legal Aid Commission was instructed, and they drafted written submissions in support of the appeal. Four points were taken. First, the trial judge should have concluded that it had not been physically possible for Ananaiasa to have inserted his penis into MS's vagina when (a) they were both standing up, (b) she was shorter than him, (c) he was holding her tightly and (d) he had his hand over her mouth. Secondly, the extent of MS's evidence was that Ananaiasa had merely *tried* to insert his penis into her vagina, not that he had succeeded in doing so. Thirdly, the trial judge failed to give sufficient weight to the fact that MS did not tell her cousin or her mother that she had actually been raped when it was to her cousin's home that she went first of all. Fourthly, the trial judge did not give cogent reasons for why he disagreed with the opinion of the assessors, it being well established in the authorities that when a judge

takes a different view about the guilt or otherwise of a defendant, he must give cogent reasons for disagreeing with them.

17. The Full Court thought that the main thrust of Ananaiasa's case was the contention that the judge's reasons for disagreeing with the assessors were insufficiently cogent. They concluded that the judge's reasons were cogent, and they rejected the other grounds of appeal – in particular that it was wrong to say that MS's evidence, taken at its highest, amounted to an allegation of *attempted* rape only. She may have started off by saying that he had tried to insert his penis into her vagina, but she continued by saying that he had managed to do that.

The petition to the Supreme Court

18. Ananaiasa now applies to the Supreme Court for leave to appeal. He drafted the petition himself, as well as the affidavit in support and two sets of written submissions. He has in addition filed a notice of motion asking for bail, together with an affidavit in support and written submissions, all of which have been drafted by him. This application for bail was presumably for bail pending the hearing of his application for leave to appeal to the Supreme Court, but it was only issued two weeks ago, and it is not appropriate for us to consider it so late in the day.

19. None of Ananaiasa's submissions have been drafted as crisply as a lawyer would have drafted them. Indeed, they are rambling, repetitive and at times incomprehensible. That is not said by way of criticism of Ananaiasa. He is, I imagine, of limited education, and he has no doubt done the best he can, but many of the points he makes show that he does not have a real appreciation of the limited role of an appellate court. For example, some of his grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. As has been said before, the weight to be attached to some feature of the evidence, and the extent to which it assists the

court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the trial judge took was one which could not reasonably have been taken.

20. In my opinion, the only points which might just have some merit are the third and fourth of the four points taken by Ananaiasa's counsel in the Court of Appeal: the alleged failure of the trial judge to give sufficient weight to the fact that MS did not tell her cousin or her mother that she had been raped when she went to her cousin's home on the day in question, and the contention that the trial judge's reasons for disagreeing with the assessors were insufficiently cogent. The first of the four points – that it had not been possible for Ananaiasa to have inserted his penis into MS's vagina while they were both standing up – is not arguable. That was entirely a matter of fact for the trial judge to weigh up, and his conclusion that it had indeed been possible was one which he was reasonably entitled to reach.

21. I deal first with the fact that while MS was at her cousin's home, she did not tell either her cousin or her mother that she had actually been raped. In many jurisdictions judges are required, when summing up in a rape case, to tell the jury that they should avoid making false assumptions or adopting misleading stereotypes about rape.[2] There is no typical response to rape. The woman's reaction may not be what one might have expected or what the members of the jury might have thought they would have done in similar circumstances. Some women – especially younger ones – may find it very difficult to spell out what actually happened to them. Their reluctance to do that should not necessarily be taken to mean that their evidence at trial that they had been raped cannot be believed. In this case, the trial judge did not give such a direction to the assessors. If he had done that, it may be that the assessors might have expressed different opinions. Certainly the judge was entitled to conclude – as he must have done – that the fact that MS could not bring herself to tell

[2] See, for example, the position in the UK as set out in the Crown Court Compendium Part 1 (July 2024) at pp 20-5 and 20-6.

her cousin or her mother when she saw them at her cousin's home that she had actually been raped was not something which damaged her credibility.

22. I turn to the cogency of the trial judge's reasons. I have set out earlier in this judgment the reasons which the trial judge gave for disagreeing with the opinions of the assessors. In my opinion, the reasons he gave for rejecting the points made on behalf of Ananaiasa were cogent – as were the telling points made by the prosecution (which the trial judge expressly adopted) that there had to be some reason why MS was in such distress when she got to her cousin's home and that no motive was ever advanced on behalf of Ananaiasa for why MS should tell lies about him. It has been known, of course, for women to make false allegations of rape – invariably because they were ashamed to have engaged in consensual sexual activity – but that cannot have been the case here because Ananaiasa's case at trial was that no sexual activity had occurred at all.[3]

23. Ultimately, though, the judge believed MS's evidence. He described her evidence as credible and reliable. He did not find anything contradictory, inconsistent or implausible in her account of what she said had happened to her, and he did not say that there had been anything in the way in which she had given her evidence for him to doubt what she had said. In all the circumstances, it is not possible to characterize the reasons which the judge gave for disagreeing with the opinions of the assessors as anything other than cogent.

Conclusion

24. For these reasons, I would refuse Ananaiasa leave to appeal to the Supreme Court.

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[3] That was what the trial judge understood Ananaiasa's case to be – no doubt because in cross-examination it had been put to MS by Ananaiasa's counsel that he had not raped her at all. Indeed, in para 15 of his judgment, the trial judge said: "The defence is totally denying that the accused raped the complainant in the bathroom that morning whilst she was doing the washing." He had said much the same thing to the assessors in para 66 of his summing-up. However, this does not sit well with one of the things Ananaiasa said in his affidavit in support of his petition: "I admit with the complainants consent to massage and lay down with me on bed, I then pull down her clothes with her help ... I admitted that what I had done aboved [*sic*], I was drunk."

Order:

Leave to appeal to the Supreme Court refused.

The Hon. Justice Salesi Temo
President of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court