IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0038 of 2023
Court of Appeal No. AAU 0057 of 2018

BETWEEN: **VILIAME WAQANINAVATU**

Petitioner

AND: **THE STATE**

Respondent

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

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court

Counsel: **The Petitioner in person**
Ms L L Latu for the Respondent

Date of Hearing: **15 October 2024**

Date of Judgment: **30 October 2024**

JUDGMENT

Gates, J

1. I have had the advantage of reading in draft the judgment of Keith J. I am in agreement with the orders proposed, save those in relation to the allegation of incompetence against his lawyers. Unhappily, I do not agree with my brother judges over the order to remit this part of the appeal to the Court of Appeal to be considered afresh.

2. How this issue is to be raised in the appellate courts is well established. Incompetence of the trial lawyer is a claim sometimes lightly and easily made. These are not claims the appellate courts are equipped to deal with. I do not believe the present petitioner has made those allegations lightly, and I accept that his claim is made genuinely.

3. Complaints can be brought to the Chief Registrar's Legal Practitioner's Unit, when the lawyer in question can fairly and properly be asked to respond to such complaints. Investigations may result thereafter, and in some instances, a case of professional misconduct may be brought against the lawyer before the Independent Legal Services Commissioner (the ILSC).

4. The criticisms of this lawyer, as Keith J has noted, were not spelled out either in his notice of appeal to the Court of Appeal or in his written submissions in support of that appeal.

5. On the 14th of September 2018, the petitioner had made a formal complaint to the Chief Registrar's Legal Practitioner's Unit. This was made seven months after his trial. The Court of Appeal was probably aware of it. Such claims were not supported by sworn evidence in an affidavit. They came to the notice of the court from documents which the petitioner had attached to his written submissions filed in response to the State's response to his own interlocutory application.

In the Court of Appeal

6. The petitioner raised this claim with the single judge of the Court of Appeal. The Judge dealt with this ground, the 23rd ground, at the hearing on the 17th of July 2020. Delivering his judgment, refusing the application for an enlargement of time and for leave to appeal, Prematilaka JA said:

> *[58] This ground of appeal consists of allegations and criticisms of the trial counsel. The Court of Appeal set down the procedure to be followed prior to advancing a ground of appeal based on criticism of trial counsel in **Chand v The State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The attention of the appellant was drawn to this aspect when the matter was mentioned on 28 May 2020. However, he does not appear to have followed the guidelines given in **Chand** and therefore, I shall not consider this ground of appeal.*
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> *[59] By way of a general observation, I wish to add that section 35(4) of the CA Rules mandates that the notice of appeal shall precisely specify the grounds upon which the appeal is brought. Many of the appellant's grounds of appeal lack this salutary requirement fully or partially which makes it harder for the appellate court to consider the merits of his appeal."*

7. In the Full Court Mataitoga JA reviewed all of the grounds. His Lordship referred to the fact that the petitioner had been advised to follow the proper procedure and to provide supporting evidence, to follow the steps as set out in **Chand v The State** [2019] FJCA 254; AAU 78.2013 (28 November 2019). The important advice was not followed. The proper procedures were not followed to put the matter properly before the Court. The court did not consider the ground of appeal in any depth because the proper procedures were not followed. Further on Mataitoga JA made comments that the ground *"was self-serving, scandalous, and misconceived."* Keith J interprets these to mean that the ground was not considered by the full court at all. I take it differently. I take it to mean that the ground was not correctly raised as laid down in **Chand** and that both the single judge and the full court had dismissed the ground. The matter had therefore been determined.

8. The **Chand** decision had been upheld by the Supreme Court in **Nilesh Chand v The State** [2022] FJSC 28 CAV0001.2020 (27th October 2022) which had approved the procedure decided in **Regina v Doherty and McGregor** [1997] EWCA Crim.556 (1997 2 Cr. App. R.218.

9. The essence of that procedure is to provide for the Court *"an objective and independent basis other than complaints made by the convicted criminal as to what happened."* **R v. Achogbuo** [2014] EWCA Crim.567; [2014] WLR [D] 137.

10. It is not clear why the petitioner failed to heed the single judge's advice which was clearly designed to assist him in presenting this part of his case. The petitioner, a police officer of 13 years experience, in addressing our court, appeared to be both intelligent and articulate. In the Court of Appeal and Supreme Court he has been industrious in compiling his materials, documents and submissions. His written submissions to the Court of Appeal alone was a document of 314 paragraphs in 52 pages.

His criticism of Counsel

11. The petitioner has listed many criticisms of his two counsel. One was for instance, that the medical report on the complainant was not produced by the defence. The report was in the disclosures but not tendered by the prosecution. In the report there were no injuries recorded. This has often been the case. A woman being raped may find the safest course for her to avoid further violence, is not to resist. Counsel did not pursue a line challenging the identity of the rapist, nor the theory that when the petitioner did not drop her back to the hostel, out of frustration she made the complaint of rape against him. The petitioner was also disappointed that no objection was made to the amendment of the charge of attempting to pervert the course of justice, to include "*with others*."

12. Keith J indicates 5 criticisms which the petitioner did not list in his criticisms. One of them was that the lawyers did not make much of an issue arising out of the disclosures, namely the comments on her behavior made in statements of other police witnesses not

called. His Lordship refers to the directions given to jurors in many jurisdictions that there is no typical response to rape. The same could be said of the expression of grief by widows. It can be of course only speculation as to why this material was not used by the defence to destroy the credibility of the complainant.

13. The petitioner complains that his counsel failed to follow his instructions given by him before the commencement of the trial that he wanted to give evidence. We were handed up the solicitor's 3 page letter in response sent to the Chief Registrar Legal Practitioners Unit. At paragraph 11 of the letter his counsel explained:

> *"[11] Before the trial and after the prosecution closed their case the complainant was advised on his right to give sworn testimony or remain silent. The consequences of both were explained to him. Hence he chose to remain silent."*

14. The moment for final advice on whether an accused should give sworn evidence is when at the close of the prosecution's case the judge asks the accused whether he elects to give sworn testimony or to remain silent. No doubt Counsel would have discussed this important decision with his client before the trial. But the decision may also involve a consideration as to how well the defence have done with the prosecution evidence so far. Obviously we do not know the full account of the advice. But his Counsel has summarized what happened and said the consequences of both elections were explained. It remained a choice for the Petitioner, which he exercised himself.

15. In view of the intelligence and articulateness of the petitioner, it would seem that he was properly explained the position before and after the prosecution case, and that the Counsel fulfilled his duties to his client.

16. The Supreme Court in **Vereivalu and Others v The State** [2022] FJSC 48; CAV0005.2019 (27 October 2022) took an unusual course for a Supreme Court in hearing evidence. The criticisms of counsel were upheld. The conduct revealed that counsel, who had an opportunity of being heard, had acted for all of the accused, consisting of two groups. Each group blamed the other. Their evidence amounted to what lawyers call *"a*

cut throat defence." The defence counsel was impossibly conflicted and had never put the defence to the witnesses of one of the groups. He should never have acted for all of the accused. The breach of ethical conduct was egregious.

17. The failures of Counsel in the instant case are not so clear cut, some of which are merely speculative. They were never raised properly before or after the advice given by the single judge. The petitioner had the opportunity and ability to raise them, and failed to do so.

18. The petition therefore fails to meet the criteria for this Court to grant leave, and I would decline leave on this issue only, that is the failure of his Counsel to provide him with a fair trial.

***Keith J*:**

Introduction

19. There have been a large number of appeals in rape cases in the current session of the Supreme Court in which a considerable amount of time elapsed between when the allegation was first reported to the police and when the defendant's trial took place in the High Court. This lapse of time occurred both before the defendant was charged and after. The delay in this case was not as long as in the others, but it was nevertheless significant. The issue in all these cases is whether such part of the delay for which the defendant was not responsible resulted in the defendant being denied a fair trial, and even if it did not, whether it should have had an effect on the sentence passed.

20. The present case raises another important issue. Not infrequently, defendants who have been convicted complain about their legal representation at trial. Such complaints are easy to make which is why an appellate court will often be sceptical about them. But they will usually be quite serious which is why the appellate court will look at them with care. A procedure was approved by the Court of Appeal in *Nilesh Chand v The State*[1] for determining such complaints. If there is a factual dispute between the defendant and their

[1] [2019] FJCA 254.

counsel at trial, it may be necessary for both of them to give evidence before the appellate court and be subject to cross-examination to enable the court to determine where the truth lies. That will not happen very often. It will only happen where the issue cannot be resolved in some other way, and if the determination of the issue is crucial to the outcome of the appeal. This is a case in which serious complaints are made about the quality of the legal representation which the petitioner received at his trial.

21. The petitioner is Viliame Waqaninavatu. He was known as Vili, and I shall refer to him as that in accordance with the usual practice in Fiji. He was charged with rape and attempting to pervert the course of justice by "forcing" the complainant to withdraw her complaint of rape against him. His trial on these two charges took place in the High Court at Lautoka before Madigan J. He had pleaded not guilty. He was represented by two members of the same firm at his trial. The three assessors all expressed the opinion that Vili was guilty on both charges, and the judge agreed with them. He sentenced Vili to 8 years' imprisonment for the rape with a non-parole period of 7 years, and to 18 months' imprisonment on the charge of attempting to pervert the course of justice, to be served concurrently with the sentence for the rape.

22. Vili appealed to the Court of Appeal against his conviction. It was lodged out of time. The single judge refused to extend his time for lodging his notice of appeal, and Vili renewed his application for an extension of time to the Full Court. It looks as if the Full Court did not appreciate that, because it did not address whether this was an appropriate case to extend Vili's time for appealing or whether leave to appeal should be granted. Having considered the grounds of appeal, it dismissed the appeal. Vili now applies to the Supreme Court for leave to appeal against both his conviction and sentence.

23. In view of Vili's criticisms of the lawyers who represented him at his trial, it is unsurprising that he has been representing himself since then. That has resulted in a particular problem which the Court of Appeal noted. Vili filed an enormous number of documents – both before the hearing of his appeal in the Court of Appeal and since then. They consisted of notices of motion, unsworn affidavits and written submissions. They included many grounds of appeal, and those grounds of appeal kept changing. He drafted

them all himself. They are repetitive and at times unstructured. As the Court of Appeal said in its judgment:

> *"14. Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting evidence in a coordinated way. This was clear derogation from the requirement in Rule 35(4) Court of Appeal Rules which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, Rule 36(1) of the Court of Appeal Rules, requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court.*
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> *15. This appeal should not have been listed until the above rules were fully satisfied. I hope for the future, these rules will be better implemented to avoid the situation in this appeal, where the grounds of appeal have been amended so often; even on the day of the hearing further amendment were being sought by the appellant, to be considered*."[2]

24. I agree with these observations subject to this. Litigants representing themselves will very often be incapable of drafting their grounds of appeal and their written submissions in accordance with the rules. There may be many reasons for that – lack of education and unfamiliarity with English are obvious examples. In addition, they frequently do not understand the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, will 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. 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

[2] [2023] FJCA 72 (*per* Mataitoga JA).

about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken. It is necessary to take all that into account before the drastic step of not listing an appeal is taken.

25. The problems posed by many documents being filed by unrepresented litigants for the purpose of an appeal have been highlighted by the Supreme Court many times – most recently in *Navuda v The State*.[3] The burden placed on the appellate court to sort out the wheat from the chaff is not inconsiderable. In this judgment, I propose to deal only with those grounds of appeal which are still being pursued, though to understand them it is necessary to summarise the evidence given at Vili's trial.

The evidence at trial

26. The principal evidence was that of complainant. She was referred to as Mere by the trial judge in his judgment to preserve her anonymity, even though he had referred to her by her proper name in his summing-up, as did the Court of Appeal in its judgment. She said that in the early hours of 27 October 2012 she had been drinking grog at her sister's home with her two roommates. While she was there, her friend Sai called her. He asked her to go to a nightclub in Nadi. She and her two friends went there, and stayed there with Sai for about two and a half hours. The four of them then went to another nightclub in Nadi. It was called After Dark. While they were there, Sai introduced Mere to a man who she had not met before. When the nightclub closed about an hour later, she left with the man, and he asked her to go with him to his home as he wanted to pick up some money. She agreed and they went there by taxi.

27. When they got to the building where he lived, he took her to a room in it and closed the door behind her. He asked her to hug him. She refused to do that, and told him that they were just supposed to pick up some money. He told her to sit on the bed and wait for him. She did so, and he began to hug her. She told him to move away from her, but he

[3] [2023] FJSC 45 at paras 12-3 (*per* Keith J).

grabbed her and he ended up lying on the bed on top of her. He pulled down her knickers, unzipped his pants and put his penis into her vagina. She had not allowed him to do that and was crying. When he had finished, the man left her. She went outside where she saw two police officers. She ran towards them and told them what had happened to her. One of them took her to a police station because he did not want to talk in a public place about what she was telling him. There she was interviewed by another police officer, and told her what had happened. That was when she learned that the name of the man who she claimed had raped her was Vili, that he was a police officer, and that the building in which she had been raped were bachelor quarters occupied by police officers.

28. Mere said that while at the police station Vili had been brought in and she confirmed that he was the man she had been referring to. There had not been an identification parade at the police station, but Mere identified Vili in court as the man who had raped her. Moreover, Assistant Superintendent Petero Tuinirarama, who had been outside After Dark and had seen Vili (who he knew) come out of After Dark behind a woman, gave evidence that he saw that woman again at the police station later that morning.

29. Mere also gave evidence about a number of times over the next few days when she was asked to withdraw her complaint. On one occasion a police officer named Patrick came to Mere's home with Vili's wife, and Patrick asked her withdraw her complaint. On another occasion, Mere and her roommate were taken by Patrick to Vili's home where Vili and his wife again asked her to withdraw her complaint, offering her money to do so, which would be paid when Vili got his job back. Mere told them that she was not going to withdraw her complaint. Mere also gave evidence about things her sister had told her about visits which her sister had had from Patrick, but since Mere's sister was not called to give evidence, Mere's evidence about what her sister had told her was hearsay. I return to that later.

30. The only other witness was one of the two police officers who Mere had spoken to when she got outside. That was Superintendent Pita Keni. He was the Commanding Officer of the local force. Pita confirmed that he had first seen her that morning outside the bachelor quarters. She was talking to another officer, Constable Ledua Veiqaravi – "just normal

social talk". She had appeared normal then, but about 10 minutes later she had turned up at his home. She appeared "*frustrated*". It was then that she told him that she had been raped that morning in the building which she was later to learn had been bachelor quarters for police officers. She did not say by whom, nor was she crying. He then went back to the quarters and checked the room where she had said it had happened. It was an unoccupied room at the time, and no-one was in there. He then took her to Namaka Police Station, where he handed her over to Corporal Josua Cakausese who would be in charge of the investigation. Mere's evidence had been that it was to Josua and another officer named Kelera that she had identified Vili as the man who had raped her.

31. Vili elected not to give evidence, nor were any witnesses called on his behalf. It was not suggested by Vili's lawyers that this was a case of mistaken identification. Nor was it ever put to Mere that if she had indeed been raped Vili was not the man who had raped her. Indeed, no positive case was put on Vili's behalf. What was put to Mere was simply that her evidence was a total fabrication.

The trial judge's judgment

32. The trial judge found Mere to have been a convincing witness. He described her as "determined and confident". He did not comment on Pita's description of what she was like when he came across her and Ledua, which at first blush did not sit well with someone who had just been raped, though courts have been anxious to say that there is no typical response to rape. Women behave in different ways when they have just gone through the traumatic experience of being raped. The judge did not say that he found anything 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. What she had told the police officer who she had spoken to shortly afterwards was consistent with her evidence in court.

The appeal to the Court of Appeal

33. Vili originally drafted 11 grounds of appeal, but others were added later. By the time of the hearing before the Full Court, there were 23 grounds of appeal, supported by various sets of written submission, again all drafted by Vili himself, the longest of which ran to closely typed 53 pages. All were rejected by the Court of Appeal. Vili has now refined his grounds of appeal for the purposes of his petition to the Supreme Court. Those are the grounds which need now to be addressed.

The current grounds of appeal

34. The current grounds of appeal were also drafted by Viliame himself. He also drafted the submissions in support of them. They ran to 31 pages with three appendices. They were not drafted as crisply as a lawyer would have drafted them, but they are sufficiently intelligible for them to be addressed. They relate to aspects of the trial process, the judge's summing-up, supposed inconsistencies in Mere's account, the admission of hearsay evidence, the evidence (or lack of it) of identification, the calibre of his lawyers, and the delay. The latter are the only two which in my opinion have any substance.

The trial process

35. *Disclosure*. Prior to the trial, the defence told the court that it wanted the State to provide them with the witness statements of two people: those of Corporal Daniel Naidu and Selata Wai. Vili says that these people were his neighbour in the police quarters and his wife. The court was told by counsel for the State that the State did not have them. Whether that meant that no witness statements were ever taken from them, or whether witness statements were taken from them but that they could not be found, is not clear. Vili claims that the defence should have been provided with them, but he has never said in what way he thought those witness statements might have been advantageous to him.

36. There is another feature about disclosure of which Vili complains. He claims that two years after his trial the two officers who had originally charged him on 20 November 2013 visited him in prison, and purported to arrest and charge him with the same two offences of which he had already been convicted. Vili says that they were shocked to discover that these offences had already been the subject of a trial. Vili claims that it is little wonder that witness statements got mislaid, and perhaps there were other documents which should have been disclosed to him.

37. None of this gets Vili very far. The State could only have disclosed such documents as were still in its possession. Whether or not statements were ever taken from Vili's neighbour and his wife, the fact was that the State no longer had them – if indeed they had ever existed. The matter was not pursued at trial by Vili's counsel. And the surprising post-trial events described by Vili – if true – show that the officers originally involved in Vili's case were not kept informed of later events, but it is a big leap to say from that that there were relevant documents which should have been disclosed.

38. *The absence of Viliame*. Vili was on bail during his trial. He attended his trial throughout the evidence and during closing speeches. But he was not in court during the judge's summing-up which began at the beginning of the third day of the trial. He claims that the judge sat earlier that day than he had been led to expect. We have not been told whether the State agrees with that, but the crucial point is that his lawyers were there (which suggests that they knew what time the court was due to sit that day), and no objection was taken to the judge summing the case up to the assessors in the absence of Vili. Nor did Vili's lawyers suggest to the judge at the conclusion of the summing-up that there was anything which the trial judge had said which needed to be corrected. It would, of course, have been safer if the case had been stood down for a while to await Vili's arrival, but in the circumstances his trial was not rendered unfair by his absence from court during the summing-up.

The judge's summing-up

39. *Calling Vili the rapist*. In the course of his summing-up, the judge said:

"[Mere] admitted that there was no formal identification parade at the station, but she saw him there and identified [Vili] as her rapist." (Emphasis supplied)[4]

This is said by Vili to have amounted to the judge pre-judging the case. The Court of Appeal, while not going that far, described the judge's language as "unfortunate and unfair", but that it had not resulted in a miscarriage of justice. I do not agree. Mere had told the police that she had been raped, and the judge was simply saying that she had added that the man she saw at the police was the man who she said had raped her. No-one could reasonably say that the judge had meant anything else.

40. <u>*Fijian lifestyle*</u>. Elsewhere in his summing-up, the judge said:

"You must look at the evidence dispassionately and with the wisdom of your experience of the community and the Fijian lifestyle."[5]

The judge's reference to the Fijian lifestyle is said by Viliame to have amounted to racial stereotyping. The Court of Appeal, while again not going that far, described the judge's language, and the context in which the judge used it, as "unnecessary, belittling, and condescending", but that again it had not resulted in a miscarriage of justice. I do not agree with that either. The judge was simply trying to get across to the assessors that they should use their own experience of the way people behave in Fiji when deciding where the truth lay. No-one could reasonably say that the judge had meant anything else. He was certainly not suggesting that there was any particular characteristic of Fijian behaviour which should inform the assessors' thinking.

41. <u>*Medical report*</u>. A third criticism of the judge's summing-up relates to the way the judge dealt with the following passage in Vili's lawyer's closing speech to the assessors:

[4] Page 274 of the Record of the High Court, para 20.
[5] Page 270 of the Record of the High Court, para 5.

"[Mere] said she was taken to hospital. Where is a medical report to prove sexual intercourse did occur? Where is a medical report to say that she was raped by force …"[6]

The judge referred to that in the context of his direction to the assessors to determine the case solely on the evidence given in court. He said:

"I ask you to ignore [counsel's] comments in his closing speech about the lack of medical evidence. Maybe she never saw a doctor? Medical evidence was not called and you are not to speculate why. Again, I stress, judge the case on the evidence before you."[7]

Vili's point is that there *was* a medical report on Mere, it had been included in the disclosures, but it said that no internal injuries were found.

42. Once again, the difficulty is that the report was not in evidence. Neither the State nor the defence sought to have it exhibited. The judge was therefore right when he told the assessors not to speculate what was in it. Having said that, the point which the defence was making was that the State had not called any medical evidence to show that Mere had sustained injuries consistent with forceful sexual intercourse. That would not have been asking the assessors to speculate what had been in any medical report prepared on her. It would have been inviting the assessors to infer that she could not have had any such injuries from the absence of evidence to the contrary. It would have been preferable if the judge had told the assessors that – and therefore directed himself in that way – instead of what he actually told them.

43. <u>*The complaint to Pita*</u>. It will be recalled that Pita's evidence was that when he saw Mere and Ledua outside the quarters they were chatting normally. She only complained of rape to him, Pita, when she came to his home. That, at least, is how I read the transcript of

[6] Page 405 of the Record of the High Court.
[7] Page 270 of the Record of the High Court, para 4.

Pita's evidence[8]. It is also what Vili's lawyers understood Pita's evidence to have been.[9] However, when reminding the assessors of Pita's evidence, the judge told the assessors that Mere had also told Pita that she had been raped when she and Ledua had been talking to him earlier.[10] That was not an accurate summary of Pita's evidence.

44. That was important. It meant that she did not report the rape at the earliest opportunity. 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. 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 may complain about it immediately, but others not for some time. The fact that they did not do so immediately does not necessarily mean that the complaint was a false one. It all depends on the reason the woman gives for not reporting it immediately. The difficulty is that Mere was never recalled, once Pita had given his evidence, to be asked whether she agreed that she only told Pita that she had been raped when she went to his home, and if so, why she had not mentioned it to him earlier when she was talking to Ledua. So again the evidential basis for advancing an argument based on the judge's inaccurate summary of this feature of the evidence has not been established.

45. <u>*The condom*</u>. When summarizing Mere's evidence to the assessors, the judge said:

> *"[Mere] admitted that she told the Police he was wearing a condom, something that she did not say in her evidence."*[11]

He characterized the inconsistency between her witness statement and her evidence about the condom as "minor", and unsurprising given the lapse of time between when the statement was made and her evidence in court.

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[8] Pages 393-397 of the Record of the High Court. Indeed, my reading of the transcript is entirely consistent with the witness statement which Pita gave (page 315 of the Record of the High Court).
[9] See the defence's closing speech at page 405 of the Record of the High Court.
[10] Page 274 of the Record of the High Court, para 22.
[11] Page 274 of the Record of the High Court, para 19.

46. The judge's summary of Mere's evidence was incomplete. When she was being questioned in chief, she was not asked whether the man had been wearing a condom. She was asked that in cross-examination, and she said that he had not been. She was then reminded that in the witness statement she had made on the following morning, she had said that he had been wearing a condom, and that she had seen him take it off and throw it out of the window. Despite that, she maintained that she had only told the police that she had felt that he had been wearing something slippery, and she added that when she had been examined at the hospital she had been "assumed" (this presumably was a mistype for "assured") that he had not been wearing a condom.

47. The judge's incomplete summary of Mere's evidence about the condom is not something on which Vili relied. His point is that Mere would have known whether the man who raped her had been wearing a condom. She was therefore not being truthful here. However, that was for the assessors – and then the judge – to assess, and there is no reason to suppose that they did not. Nor do I think that the incompleteness of the judge's summary of Mere's evidence on the topic gets Viliame anywhere. This was a very short trial. The assessors would have remembered what Mere's evidence had been about what she claimed she had told the police about the condom. A judge is not required to remind the assessors of all the evidence so long as the summing-up covers the salient parts of it. In all the circumstances, what the judge said about Mere's evidence about the condom was sufficient.

48. I turn to Mere's evidence about what she had been assured at the hospital. The inference which someone might have drawn from that is that vaginal swabs had been taken from Mere and had revealed the presence of semen. That would not have been fair to either Viliame or the State since Mere's evidence from which that inference might have been drawn was hearsay, no evidence having been given of the basis on which she had been given the assurance she spoke about. In the event, though, the assessors were not asked to draw that inference. No reference was made to it in the closing speeches of any of the lawyers.

Inconsistencies in Mere's account

49. Vili pointed to what he claimed were a number of inconsistencies in either Mere's account of what had happened to her or between her account and that of other witnesses or potential witnesses. First, he claims that Mere's evidence about having identified him at the police station as the man who had raped her was inconsistent with her later evidence that the only time she had met Vili was when Patrick had taken her to Vili's home. In fact, there was no such inconsistency. The question she was asked about seeing Vili at his home was about the only time she had seen Vili *after the night of the incident*. She was not saying that that was the only time she had seen him.

50. Secondly, the disclosures included a witness statement from Mere which had been taken by WSC Elesi Tuvou at 11.45 am on 27 October 2012 – ie within a few hours of when Mere claimed to have been raped. In that witness statement, Mere said that the room to which the man who raped her had taken her was "the last room on the right hand side of the right compartment".[12] Vili drew our attention to two witness statements in the disclosures, whose combined effect was to contradict that. One was from Special Constable Josefa Kama to the effect that that room was occupied by Constable Rogoele Nava, and the other was a statement from Rogoele to the effect that he had been in his room all that night.[13] The fact that the room in which Mere had claimed to have been raped had been occupied all night shows, says Viliame, that she could not have been raped where she said she was.

51. The difficulty with this contention is that there is no evidential basis for it. Mere was not cross-examined on this part of the witness statement she gave to Elesi, and neither Josefa or Rogoele were called to give evidence. The inconsistency in the witness statements was never explored or even mentioned in the course of the trial. The only *evidence* about where the alleged rape had taken place was that of Pita that the room was unoccupied, but

[12] Page 300 of the Record of the High Court.
[13] Josefa's and Rogoele's statements are at pages 316 and 319 of the Record of the High Court.

even that was hearsay because it was based on what Mere had told him, and she never gave evidence herself about which room she had been raped in.

52. Thirdly, Mere described in her evidence how she had been sitting on the bed when the man forced her on to her back and raped her. As I read her evidence, she was also saying that there had been a mattress in the corner of the room as well. However, in the witness statement which she gave to Elesi she said that the man "told me to sit on a mattress which was laid on the floor".[14] In other words, he had told her to sit on a mattress, not on a bed. Again, the difficulty with this was that Mere was not cross-examined on this part of her witness statement. The inconsistency – if it could be described as such – was never explored or even mentioned in the course of the trial. In other words, there was no evidential foundation for it.

53. Fourthly, Mere's evidence was that on leaving the building in which she had been raped, she *ran* over to the two police officers she saw outside. Vili claims that that was inconsistent with Pita's evidence. Pita said that he did not see her running because she was already talking to Ledua, the other officer, when he first saw her. So such inconsistency as there was between her evidence and that of Pita was not that she *ran* to the police officers, but that she was talking to Ledua first before Pita joined them. That may be so, but it was for the assessors – and then the judge – to determine whether or not that minor inconsistency undermined her credibility as a witness. To the extent that they considered it, they must have determined that it did not.

Hearsay evidence

54. Vili argued that the judge permitted inadmissible hearsay evidence to be given. Three examples were relied on. First, Mere's evidence was that Sai knew Vili. Only Sai could know that, and he was not called to give evidence. That argument is misconceived. Mere gave that evidence having been asked how she met Vili. She said that Sai had called Vili over. The only fair reading of her evidence was that she was saying that it was because Sai had called Vili over when they were at After Dark that she realised that Sai knew him.

[14] Page 300 of the Record of the High Court.

55. Secondly, there is this passage in Mere's evidence-in-chief:

"Q. What happened at the police station?

A. At the police station Peter asked one Police officer and the police officer said its Vili the name of the boy is Vili because I told them I don't know Vili is a Police man or what because they never told me he is a police man. From there I came to know he is a police officer.

Q. What did they ask him?

A. Peter asked him My Lord who came with me to that room and that officer told Peter that it was Vili. From there I came to know that Vili stays in the quarters but not in the dome."[15]

Peter is a reference to Pita, and "dome" is a mistype for "dorm". The effect of this evidence is that an unidentified officer told Pita that the man who had gone with Mere to the room in the police quarters was Vili, and it was that which resulted in Mere knowing the name of the man who she said had raped her. Vili claims that this amounted to inadmissible hearsay.

56. The difficulty here is that we do not know the source of the unidentified officer's information that the man who had been with Mere in the room had been Vili. If it had been something which *Mere* had said, it would not have been hearsay. It would only have been hearsay if it had been something which someone else had said. The source of the unidentified officer's information was not explored at trial, and so we are none the wiser. Having said that, it would not, I think, have been entirely clear at the time what Mere was saying in this part of the evidence, and in any event the judge did not remind the assessors about it. My strong impression is that, if indeed this was hearsay (a big "if"), it would have played little, if any, part in the assessors' thinking.

[15] Pages 380-381 of the Record of the High Court.

57. Thirdly, in her evidence-in-chief, Mere was asked whether she had seen Vili again after the day in question. Her answer was:

> *"Vili asked Patrick to come and call me … so we can go and talk at Vili's place."*[16]

Apart from Vili, only Patrick would have known that, and he was not called to give evidence. Vili claims that this was therefore inadmissible hearsay. Technically, that may be correct, but it does not get Vili anywhere. Since Patrick took Mere to Vili's home to discuss the dropping of her complaint, the request for that must have come either from Vili or from someone acting on his behalf – for example, his wife. It could not have come from anyone else.

58. There are two other examples of inadmissible hearsay evidence having been given upon which Vili did not rely. I have already mentioned them. One was Mere's evidence that she had been assured at the hospital that the man had not been wearing a condom. I have explained why that was not problematic in the context of the case as a whole. The other was Mere's evidence about what her sister had told her about the visits she had received from Patrick. However, what Mere said her sister had told her added nothing of substance to the case, and no-one referred to it later on in the trial.

Identification

59. Vili makes three criticisms about Mere's identification of him as the man who raped her. First, there was no identification parade. Vili says that there should have been one. Secondly, there was the dock identification. Vili says that that should not have happened. Thirdly, the judge did not give the assessors a *Turnbull* direction.[17] Vili says that he should have done.

60. *Was identity in issue?* When refusing Vili an extension of time for filing his notice of appeal, the single judge expressed the view that identification had not been an issue at the

[16] Page 381 of the Record of the High Court.
[17] *R v Turnbull* [1977] QB 224.

trial. He agreed with the State's contention that Vili's case had been run on the basis of "false accusation and not mistaken identity". In those circumstances, an identification procedure had not been necessary, nor had a *Turnbull* direction, and the dock identification had added nothing to the case. The Full Court did not say in so many words that identification had not been in issue at the trial, but that was, in effect what they concluded. They pointed out that Mere's evidence had been that she had been with the man who subsequently raped her at After Dark for an hour, and that at the police station she had identified Vili as the man who had raped her.

61. With great respect to the single judge and the Full Court, I do not agree. I say that for four reasons. First, Mere was cross-examined about another police officer who had been at After Dark that night. She agreed that there had been another police officer there. It was put to her that she had said in her witness statement that his name was Simeli. Her evidence was that she had not known his name, but that the police had told her his name, and that that was how his name had got into her statement. On the other hand, she acknowledged that her witness statement had not said that the name of the man who had raped her was Vili. Her explanation for that was that she did not know his name when she was giving her statement. The point which the defence was trying to make, therefore, was that of the two police officers who she had met in After Dark that night, she gave the name of the one who had not raped her, but not the name of the one who had raped her. The only reason for making that point was to allege that if she had indeed been raped that night by a police officer, it had been Simeli who had raped her. That may not have gone to the question of visual identification, but it showed that the identity of the person who allegedly raped her was in issue.

62. Secondly, Mere was asked about another passage in her witness statement. Having referred to Simeli as a police officer who she had been drinking with, she said:

> *"We were drinking and when one man came and stood beside us and talking to Simeli. At about 4.55 am I walked towards the door on my way home when I noticed that someone was behind and following me. When I was outside, he*

came to me and told me that he needs me to accompany him to drop something in his room."[18]

She then went on to describe how that man had taken her to what she thought was his room and had raped her. The point which the defence were making was that she never made it clear which of the two men it was who had followed her out of After Dark and who had subsequently raped her. Again, that may not have gone to the question of visual identification, but it showed that the identity of the person who had raped her was in issue.

63. Thirdly, it was put to Mere in cross-examination that she had not been able to describe the man who had raped her, and that the room in which it had happened had been dark. Indeed, in his closing speech, Vili's lawyer made the point about the room being dark. The only relevance of those questions was to test her visual identification of Vili as the man who had raped her. Fourthly, after the conclusion of the evidence, and the assessors had left court, the judge asked counsel whether there were any particular directions they wanted him to give the assessors. Vili's lawyer said: "Identification?" That meant that the defence saw Mere's visual identification of Vili as the man who raped her as an issue. The judge said: "Leave it to me." In the event, he gave no directions to the assessors on the topic at all.

64. One feature which the Full Court treated as significant on the question whether identity was in issue at the trial was that Vili had elected not to give evidence. In other words, he had chosen not to give evidence contradicting Mere's identification of him as the man who had raped her. It is true that he did not do that, but that does not mean that identity was not in issue. He was putting the State to proof. By not giving evidence, he was not advancing a positive case, but he was still requiring the State to prove that he had indeed been the man who had allegedly raped Mere.

65. *Identification parade*. With all this in mind, I turn to whether there should have been an identification parade. An identification parade can only take place if the suspect consents,

[18] Page 289 of the Record of the High Court.

but there is, so far as I know, no local authority on when a suspect should be invited to attend an identification parade. The Fiji Police Force Standing Orders go into some detail about how an identification parade should be conducted, but not when the holding of an identification parade is desirable. However, an identification parade (or any other identification procedure for that matter, such as identification from a selection of photographs) will not be appropriate when the witness has already seen the suspect at the police station. Mere saw Vili at the police station where she identified him. Once that had happened, no identification parade could have taken place. Could Vili have been asked to go on an identification parade *before* Mere had seen him at the police station? After all, it looks as if he may have been brought to the police station as a suspect, not that he happened to be at the police station in the line of duty. But we just do not know for sure because that possibility was never explored at the trial.

66. *Dock identification*. Then there was the dock identification. It has been called "the ultimate leading question"[19]. The appropriateness of a dock identification was considered at length by the Supreme Court in *Naicker v The State*. The Court said[20]:

> *"The dangers of a dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognises him, but because the witness knows from where the defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to a dock identification, it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account."*

[19] *Lotawa v The State* [2014] FJCA 186 at para 7 (*per* Madigan JA).
[20] [2018] FJSC 24 at para 25 (*per* Keith J).

67. The inescapable fact is that counsel for the State should not have asked Mere whether the man she described as Vili – ie the man who had raped her and to whose home she had gone with Patrick a few days later – was in the courtroom, but once the question had been asked, the judge should have intervened to tell Mere not to answer it and to explain to the assessors why he had intervened. Since that did not happen, it was even more incumbent on the judge to direct the assessors in the summing-up that they should ignore the identification in court of Viliame by Mere and to explain why. He did not do that.

68. *A Turnbull direction*. The judge did not give the assessors a *Turnbull* direction – so named after the judgment of the English Court of Appeal in *R v Turnbull*.[21] Where the case against a defendant depends wholly or substantially on the correctness of someone's identification of the defendant, *Turnbull* requires the judge (i) to warn the assessors of the special need for caution before convicting on the basis of that evidence, (ii) to tell the assessors what the reason for that need is, (iii) to inform the assessors that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken, (iv) to direct the assessors to examine closely the circumstances in which the identification was made, (v) to remind the assessors of any specific weakness in the identification evidence, (vi) to remind the assessors (in a case where such a reminder is appropriate) that even in the case of the purported recognition by a witness of a close friend or relative, mistakes can occur, (vii) to specify for the assessors the evidence capable of supporting the identification evidence, and (viii) to identify the evidence which might appear to support the identification but does not in fact do so. *Turnbull* has frequently been adopted in Fiji, and it is now part of Fiji's law. Since identity was in issue, and since the case against Vili depended substantially on the correctness of Mere's identification of him, a *Turnbull* direction should have been given.

69. *The effect of these irregularities*. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a "substantial miscarriage of justice" occurred? In other words, would the judge still have convicted Vili if there had been no dock identification of him and if he had directed himself in accordance with *Turnbull*? I am

[21] [1977] QB 224.

sure that he would have done. I say that for four reasons. First, this was not a case in which the witness had no more than a fleeting glimpse of the perpetrator. On her evidence, she had been with the man who she said had subsequently raped her for over an hour at After Dark, and she had then accompanied him to the building where she said he had raped her. Secondly, the fact that Vili was the man with whom Mere had left After Dark was supported by Petero's evidence. Thirdly, Mere had seen the man who she said had raped her a few days later when Patrick had taken her to Vili's home, and the defence accepted that it was Vili who she had seen on that occasion. Fourthly, the attempts by Vili and his wife to get Mere to withdraw her complaint are more consistent with them knowing that her complaint was true rather than them believing that her complaint was false but that it could nevertheless harm Vili's career and perhaps result in his prosecution.

Delay

70. It will be recalled that the incident which gave rise to the charges which Vili faced took place on 27 October 2012. It was reported to the police later that day. Vili was interviewed by the police on 5 December 2012, and by then statements had been taken from all the witnesses whose statements were among the disclosures (with the exception of the statement of the officer who told Vili on 20 November 2013 that he was being charged). However, his trial did not begin until 19 February 2018 – over five years after he had been interviewed by the police. Vili contends that this fatally affected the fairness of his trial, and amounted to both a breach of his right under section 15(1) of the Constitution to a fair trial, as well as a violation of his right under section 14(2)(g) of the Constitution "to have the trial begin and conclude without unreasonable delay".

71. *Two distinct rights*. The right to a fair trial and the right to be tried "without unreasonable delay" will often overlap, but they are distinct and separate rights. Breach of the right to be tried "without unreasonable delay" will not necessarily amount to a breach of the right to a fair trial. As Wilson J said in the Supreme Court of New Zealand in *R v Williams*:

"... the court may be satisfied that the right to be tried without undue delay has been infringed although the accused has been unable to demonstrate any particular prejudice in defending the charges."[22]

A little later, he said:

"The right to trial without undue delay is directed to the time that elapses between arrest and final disposition, including any appeal, whereas the right to a fair trial comes into play at the time of trial. The two rights overlap, however, where the consequence of undue delay in bringing an accused to trial is that a fair trial cannot be held. Both rights are then breached."[23]

72. *The remedy for breach of these rights*. Where a defendant's right to a fair trial has been infringed by the delay in bringing the trial on, the usual remedy will be a stay of the proceedings. However, where only the defendant's right to be tried "without unreasonable delay" has been infringed, a stay of the proceedings, as Wilson J said in *Williams*, will not be "a mandatory or even a usual remedy".[24] That was explained by Lord Bingham in the Court of Appeal in England in *Attorney-General's Reference (No 2 of 2001)* as follows:

"If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain

[22] [2009] 2 NZLR 750 at para 9. The right to be tried "without undue delay" is guaranteed by section 25(b) of the New Zealand Bill of Rights Act 1990.
[23] Para 19.
[24] Para 18.

proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."[25]

73. <u>*The time to apply for a stay*</u>. Where it is said that a defendant cannot have a fair trial – whether because of the delay or for some other reason – the appropriate time for him to apply for a stay of the proceedings is before the trial begins. No application for a stay was made by Vili before his trial. Indeed, as far as I can tell, the issue of delay was not raised by his lawyers prior to the trial at all. Should Vili nevertheless be allowed to argue after his trial that the delay in bringing him to trial was such that he was denied a fair trial? The Full Court thought not. So far as his right to a fair trial was concerned, they said that he could have raised the breach at his trial – presumably by asking for a stay of the trial. When it came to the violation of his right to be tried "without reasonable delay", they said that he could have sought constitutional redress. Presumably the Full Court thought that it had not been right for Vili to have allowed the trial to proceed, and to have cried foul only after he had been convicted.

74. The question whether, after the trial has taken place, a defendant can challenge his conviction on the ground of the delay in bringing him to trial when he had not previously said that the delay had prevented him from having a fair trial was considered by the Court

[25] [2004] AC 72 at para 24. The references to "the defendant's Convention right" are references to the right in Art 6(1) of the European Convention on Human Rights to be tried "within a reasonable time".

of Appeal in *Seru v The State.*[26] In that case, both defendants had raised the issue of delay prior to their trial, and the Court of Appeal considered two matters. First, by what route did the Court of Appeal have jurisdiction to treat delay as a ground of appeal, even if the issue of delay had been raised before the trial? Secondly, where the issue of delay had not been raised before the trial, could it subsequently be raised on an appeal against conviction? The Court of Appeal did not express a final answer on either of those questions. What it said was this:

> *" ... the State did not deny the Court had jurisdiction to consider the argument based on section 29(3). In the absence of argument we do not express a final opinion on the foundation of the jurisdiction, but the possibilities include regarding it as founded on the miscarriage of justice ground under section 23(1)(a) of the Court of Appeal Act 1949; or the rationale may be that section 29(3) expands the statutory grounds of appeal. A leading decision in the Supreme Court of Canada, R v Morin (1992) CR (4th) 1 dealt with a delay argument after trial and conviction; although the appellant's contention failed, none of the judgments suggested the argument could not be raised at that stage. Likewise, in R v Coghill [1995] 3 NZLR 651, a full court of the New Zealand Court of Appeal dealt with a delay argument under the corresponding New Zealand legislation, on an appeal after trial. We consider it is open to an appellant to raise the delay issue post trial, certainly in cases where, as here, the point has been taken pre trial, and an appeal against dismissal was lodged and remained extant. To what extent this Court has jurisdiction to entertain such a ground post trial in different circumstances must remain to be decided in cases where that issue arises."*

75. The cases of *Morin* and *Coghill* cited in *Seru* were, like *Seru*, cases in which, unlike the present case, the issue of delay was raised prior to the defendants' trial. I have come across only one case prior to the present one in which an appellate court has had to consider the issue of delay when the issue had not been raised prior to the defendant's

[26] [2003] FJCA 26.

trial. That case is the decision of the Supreme Court in *Nalawa v The State*.[27] It did not specifically address the question whether a failure to raise the issue of delay prior to the trial prevented it from being raised on appeal. It referred to the judgment of the Court of Appeal which had noted that the case had been adjourned a very large number of times. The Court of Appeal had acknowledged that

> *"many of the adjournments were simply due to the unavailability at Lautoka of sufficient magistrates to enable matters to be heard in a timely manner. But many of the adjournments were at the request of the appellant after the withdrawal of defence counsel, after the sacking of defence counsel or while the appellant sought legal aid …"*

Although the Supreme Court noted that "not once did he or legal aid solicitors appearing on occasion for him … complain about delay or breach of his right to be tried within a reasonable time"[28], it said that it was led "to the inescapable conclusion that the petitioner is the cause of his own problems as far as delay is concerned".[29] Looking at these passages in the round, it looks to me as if the Supreme Court refused leave to appeal, not so much because it had no power to consider an appeal based on delay when delay had not been raised as an issue before the trial, but rather because it was the defendant in that case (or perhaps his lawyers) who had been responsible for much of the delay, and the defendant was therefore the author of his own misfortune.

76. In my view, the failure of Vili or his lawyers to apply for a stay of the proceedings before his trial did not prevent him from raising the issue of delay on his appeal against his conviction. The reason is that in many cases, the adverse impact of the delay on the fairness of the trial may well not become apparent until the trial is already under way. For instance, it may not have been appreciated before the trial began that the memory of a particular witness who it was believed could have given evidence favourable to the defence was as poor as it turned out to be, or that such a witness had become unavailable, whether through death, illness, absence overseas or being unable to be found. And every

[27] [2010] FJSC 2.
[28] Para 31
[29] Para 32.

lawyer knows that unexpected things can emerge in the course of a trial. Perhaps a new issue has arisen, but as a result of the delay witnesses who might have been able to give evidence favourable to the defence on that issue are not available. Other examples can be given, but that is sufficient to make the point. In my opinion, the Court of Appeal should have considered whether there had been a breach of Vili's right to a fair trial and his right to be tried "without reasonable delay", even though the issue of delay had not been raised before his trial. That accords with what the Supreme Court did in *Nalawa*, even though it did not consider the jurisdictional basis for doing so.

77. *The consequences of delay*. A lengthy delay in bringing a defendant to trial has two consequences. The first, of course, is that it could have an adverse impact on the trial itself. I have already touched on that: the unavailability of witnesses, the impact of the delay on their memory, the destruction or loss of relevant documents to name just a few. But there is also the impact of the delay on the defendant. Some delay will be inevitable as both sides prepare for trial, and once they are ready, a judge, a courtroom and court staff will have to be made available, but the longer the delay, the greater the impact of the prosecution on the defendant. If the charges are serious, and the defendant knows that he or she will be going to prison for a long time in the event of conviction, life for them will often stand still. They cannot make plans for the future as they do not know what the future will hold. They may be suspended or dismissed from their employment. Their family life will inevitably be affected. They may still be able to get a fair trial, but that does not mean that they have not been prejudiced in other ways. The anxiety of someone who is awaiting trial and is presumed to be innocent until his guilt has been established at trial should not be underestimated. In addition, the defendant may have been remanded in custody pending his trial or subject to onerous bail conditions. The fact that delay has both these consequences was pithily expressed by Lord Templeman in the Privy Council in *Mungroo v R*:

> *"The right to a fair trial 'within a reasonable time' secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the*

period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum."[30]

78. *The test for determining breach of these rights*. In *Morin*, Sopinka J in the Supreme Court of Canada said:

"The general approach to a determination as to whether the right [to be tried within a reasonable time] has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay … While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. *the length of the delay;*
2. *waiver of time periods;*
3. *the reasons for the delay, including*
   - *(a) inherent time requirements of the case,*
   - *(b) actions of the accused,*
   - *(c) actions of the Crown,*
   - *(d) limits on institutional resources, and*
   - *(e) other reasons for delay; and*
4. *prejudice to the accused."*[31]

This statement of principle was adopted by the New Zealand Court of Appeal in *Martin v Tauranga District Council*[32] and by the courts of Fiji – by the Court of Appeal in *Mills and ors v The State*[33] and by the Supreme Court in *Nalawa*.

[30] [1991] 1 WLR 1351 at page 1352. The right to be tried "within a reasonable time" is guaranteed by the Constitution of Mauritius.
[31] *Morin v The Queen* [1992] 1 SCR 771 at pagers 787d-788a. The right to be tried "within a reasonable time" is guaranteed by section 11(b) of the Canadian Charter of Rights and Freedoms.
[32] [1995] 23 NZLR 419.
[33] [2005] FJCA 6.

79. Sopinka J made important comments on all of these factors, but he thought that one particular factor needed to be looked at with a degree of realism. That factor was "limits on institutional resources". Very often the system will not be able to accommodate the parties even when they are ready for trial. We live in a world in which resources are limited. On that topic, Sopinka J said:

> *"How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render [the right to be tried within a reasonable time] meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishers this obligation from many others that compete for funds with the administration of justice."*[34]

80. I gratefully adopt Sopinka J's approach with one reservation. Prejudice to the defendant is obviously of critical importance to whether the delay has resulted in a breach of the defendant's common law right to a fair trial, but it is, I think, less relevant to whether the delay has resulted in a breach of his right to be tried "without unreasonable delay". As Wilson J noted in *Williams*[35], a defendant's right to be tried without undue delay may have been infringed even though the defendant has been unable to demonstrate any particular prejudice in defending the charge.

81. *The application of the test to Vili's case*. With these principles in mind, I turn to the present case. We were told that the police sent their file to the office of the Director of Public Prosecutions in May 2013 for a decision to be made whether Vili should be

[34] At p 795f-j.
[35] *Op cit*, para 54 (*supra*).

charged, and if so, with what. As I have said, he was charged with the two offences on 20 November 2013, the charging decision having been made shortly before then. We were not told why it took some five months for the file to be sent to the office of the Director of Public Prosecutions, or why it then took about six months after that for a charging decision to be made. However, we can make an educated guess. For reasons which will become apparent later, there was doubt in some quarters about whether Mere had been telling the truth. Indeed, if the statement of Josua, the investigating officer, is anything to go by, he was instructed by a more senior officer to classify the case as NCIL ("No Case in Law") because of how Mere had behaved later that night. Charging a serving police officer with offences of rape and attempting to pervert the course of justice is a serious and sensitive matter, and it would not be right for so important a decision to be rushed. Having said that, it took what appears at first blush to be quite a long time for the charging decision to be made.

82. Although Vili was charged with the two offences on 20 November 2013, his trial in the High Court did not begin until 19 February 2018 – a lapse of time of more than four years. We have the judge's brief notes of what happened when Vili's case was listed for mention, and we have been provided with a detailed chronology as well. These documents show that the disclosures were ready to be served on Vili's lawyers by 5 March 2014, and the agreed facts had been filed by 14 May 2014. On that date, the case was adjourned to 30 July 2014 when it would be listed for a trial date to be fixed. However, no trial date was fixed on that date, and it was not until 25 April 2016 that a trial date was fixed. It was fixed for 28 November 2016. We were not told why it took so long for a trial date to be fixed, save that the trial date may not be fixed until the pre-trial conference has taken place. It will depend on the judge's calendar, and when he or she can slot a particular case in. The pre-trial conference had taken place by 25 April 2016 when the trial date was fixed.

83. The trial date fixed for 28 November 2016 was vacated on 2 August 2016. That was at the request of the defence: Vili's lawyers had other commitments when the trial was due to take place. A new trial date was fixed for 20 April 2017. However, that trial date had

to be vacated as well. That happened on 20 February 2017. This time it was at the request of the State: Mere could not be found. By 5 May 2017, she had been located, and on 12 July 2017 a new trial date was proposed. That was to be 19 July 2017, but that was not suitable for the defence. Eventually on 12 December 2017 a new trial date was fixed for 19 February 2018, which was the date when Vili's trial eventually got under way. Although we were not told why it took so long for the various trial dates to be fixed (two of which were either vacated or not taken up at the request of the defence), we were told that it was probably due to the inability to find earlier dates in the judge's calendar being available.

84. A lapse of time of over four years from charging to trial would not be permitted in more sophisticated jurisdictions. A delay of this kind – especially in a relatively straightforward case like this – simply would not happen. But it would be wrong to look at Fiji through the same prism. Although all jurisdictions have their own resource limitations, Fiji does not have the resources – whether in terms of judicial manpower, experienced prosecutors, courtrooms and funding – comparable to, say, Australia, New Zealand or the United Kingdom. That should not be overlooked when you compare the lapse of time in this case with delay which is treated as unacceptable elsewhere.

85. In the light of all the circumstances (though leaving aside for the present whether Vili was prejudiced in presenting his defence properly at the trial), the lapse of time in this case was, I think, on the cusp of amounting to a violation of Vili's right to be tried without reasonable delay. But it is not necessary to decide whether it was, because Vili's remedy for the breach of that right would have been a reduction in what would otherwise have been the appropriate sentence. As it turned out, that is exactly what happened. Although the trial judge did not have Vili's constitutional right to be tried "without unreasonable delay" in mind, he reduced what would otherwise have been the appropriate sentence by one year "to reflect the hardship occasioned by the long delay in bringing this matter to trial". In my judgment, that would have been the appropriate reduction to have been made if the judge had concluded that Vili's constitutional right to be tried without unreasonable delay had been breached.

86. But what about Vili's right to a fair trial? Was the delay such that he did not have a fair trial? It is here, of course, that the question of prejudice is all important. The Full Court said that Vili had not provided any evidence to show how the delay had prevented him from having a fair trial. We therefore asked Vili how the delay had had an adverse impact on the fairness of his trial. He relied on two matters. First, he claims that the witness statement from Mere about the events of the night in question was taken by Kelera, that in that statement Mere had told Kelera that a man (presumably Vili) had been brought to the police station, and that Mere had identified him as the man who had raped her. Vili asserted that Mere had not identified him at the police station, and that Kelera could have confirmed that as she had been there at the time. He would have wanted to call Kelera to give evidence on his behalf, but she had left for America by the time the trial began.

87. There are a number of problems about all that. First, Mere's witness statement about the events of the night in question was not taken by Kelera. It was taken by Elesi. Kelera only took Mere's witness statement which covered Mere's dealings with Patrick over the next few days. Secondly, in the witness statement Mere gave to Elesi, she did not say who had raped her. The evidence that it had been Vili who had raped her was Mere's oral evidence that she had seen Vili at the police station and that she had told Josua and Kelera that he was the man who had raped her. Thirdly, there is nothing to show that Kelera was even at the police station that night. The witness statement she took from Mere about Mere's dealings with Patrick was dated 30 October 2013 – three days later. But even if Kelera had been at the police station that night, the claim that Mere had not pointed out to Kelera that Vili was the man who had raped her was not challenged at Vili's trial. Vili denied through his lawyers, of course, that he had raped Mere, but it was not put to Mere that Mere had not identified Vili to Kelera (or Josua for that matter) as the man who had raped her.

88. The other matter relied on by Vili relates to the senior officer who instructed Josua to classify the case as NCIL in the light of Mere's behaviour later that night. Vili says that he would have wanted that officer to be called as a witness to give evidence about how

Mere had behaved that night, but that officer had died by the time of the trial. The problem here is that that officer's evidence about how Mere had behaved later that night would have been hearsay and therefore inadmissible. He had only gone on what Josua had told him. The evidence about Mere's behaviour could have come from Josua. Indeed, he had himself made a lengthy witness statement about that. If the defence had wanted to bring out Mere's behaviour later that night, they should have either called Josua themselves or asked the State to tender him.

89. I accept, of course, that memories fade over time, and that had the trial taken place within, say, six months of the night in question, the memory of the only witness whose evidence was challenged – Mere – would have been better. Indeed, the trial judge himself commented – both during the evidence and in his judgment – about the lapse of time of over five years. But experience has shown that once a year or so has elapsed since the events which a witness is describing, their memory may not be materially better than it would be, say, five years after the relevant events. In other words, there comes a time when a witness's memory of events may be unlikely to get very much worse. So there is a limit to how far an argument based on the fading of recollection can be taken if the trial could not take place within a year.

90. For these reasons, I do not think that the lapse of time between the ending of the police investigation and the commencement of Vili's trial had any significant impact on the fairness of his trial. His right to a fair trial had not been breached.

The criticism of Vili's lawyers

91. Vili claims that his lawyers failed to represent him properly at his trial. He did not spell out what his complaints about them were in either his notice of appeal to the Court of Appeal or in his written submissions in support of his appeal. We only know what his complaints against his lawyers were from the formal complaint he made about them under section 99 of the Legal Practitioners Act 2009 to the Chief Registrar of the High Court on 14 September 2018 – seven months after his trial.[36] That complaint was in the bundle of

[36] The complaint and the attachments to it are at pages 165-172 of the Record of the High Court.

documents prepared for the Court of Appeal, but only because it was attached to Vili's written submissions in response to the State's written response to Vili's application for an enlargement of time in which to appeal and for bail pending the hearing of his appeal. Whether the Court of Appeal found it among the large number of documents which Vili filed and which were included in the Court of Appeal's bundle of documents is questionable: the Court did not refer to it in its judgment at all.

92. The difficulty which Vili faces is that there is a recognized procedure for complaining on appeal about the incompetence of one's legal representatives. It was set out by the Court of Appeal in *Nilesh Chand v The State*. Crucially, the lawyers whose conduct of the trial has been criticized must be given an opportunity to respond to each of the criticisms made of them, so that the court can then decide whether it is necessary for oral evidence to be given on any of the topics covered by the complaints. At a hearing before a single judge of the Court of Appeal on 28 May 2020, Vili was told that if he was going to pursue his claim of incompetence on the part of his lawyers, he had to follow the established procedure for doing so. We asked him whether he had done that, but we are not sure that we understood his response. He might have been saying that he had done that, but that his lawyers had not replied. Or he might have been saying that he had not done that because he thought that his complaint under the Legal Practitioners Act was sufficient. Nor do we know whether he told the Full Court that, but the fact remains that by the time his appeal was heard by the Full Court, the court did not know what his lawyers' response to the complaints against them were – assuming, of course, that the court had found the list of his complaints (an assumption which I have already described as questionable).

93. Vili's lawyers responded to the complaints made under the Legal Practitioners Act by letter to the Chief Registrar dated 12 January 2023 – four months before Vili's appeal was heard by the Full Court. However, it was not sent immediately. It was not received by the Chief Registrar until 17 May 2023, by which time Vili's appeal to the Full Court had already been heard. In view of when the letter was received by the Chief Registrar, it was obviously not included in the bundle of documents provided to the Court of Appeal. We

have only seen it because Vili included it in one of his appendices to his written submissions in support of his petition to the Supreme Court.

94. The Court of Appeal described Vili's ground of appeal about the incompetence of his lawyers as "self-serving, scandalous and misconceived". Whether they thought that a ground of appeal of this kind justified that description, or whether they simply thought that it was self-serving, scandalous and misconceived for a ground of appeal of this kind to be pursued when it thought that the recognized procedure for pursuing it had not been followed, is not clear. But the bottom line is that this ground of appeal was not considered by the Court of Appeal on its merits at all.

95. Having said that, appeals based on the incompetence of one's lawyers rarely succeed. That is because the courts have set a very high bar for defendants to overcome. It will only be in cases of flagrant incompetence which results in the defendant being denied a fair trial that an appeal will be allowed. Adopting a particular defence strategy which many lawyers might not does not of itself amount to flagrant incompetence. A defendant who instructs a lawyer to represent them gives the lawyer the authority the run the case as the lawyer thinks best. You cannot subsequently turn round and say that the strategy was wrong. It is only if the strategy which was adopted was one which no sensible and prudent lawyer could possibly have adopted that you get into the territory of flagrant incompetence.[37] This mirrors the approach in New Zealand subject to one point. In *R v Sungsuwan*[38] the Supreme Court recognized that there may be rare cases in which the conduct of the defendant's lawyers, although reasonable in the sense that another competent lawyer might have done the same thing, might nevertheless have led to a miscarriage of justice so that an appeal would have to be allowed.

96. There are a large number of complaints which Vili makes against his lawyers. Many were included in his original letter of complaint to the Chief Registrar but some were not. I shall deal with each of them in a moment, but I deal first with a particular concern which

[37] See *Vereivalu v The State* [2022] FJSC 48 at para 63 (*per* Keith J).
[38] [2006] 1 NZLR 730 at para 67.

I have about the conduct of Vili's lawyers of which ironically no complaint has been made. It relates to two witness statements about the behaviour of Mere later on the night in question. Both these witness statements were among the disclosures, and so Vili's lawyers would have had them well before the trial.

97. The first witness statement is that of Elesi which she made on 2 November 2012.[39] It was she who took Mere to the hospital that morning to be medically examined. She said in her statement that when Mere was asked by the doctor about where the rape had happened, she did not answer but just smiled. When they got back to the police station, and she interviewed Mere, Mere never looked her in the eye. Elesi added that "she was not that series [*sic*] as a rape victim". Elesi's statement said that Mere was complaining about a headache, and that Mere "even told me to just hurry up as she really wants to go home". It went on:

> *"When I started asking her on what happened in the room where she was raped, she just stood up and walked out of the crime office."*

An hour later, Mere had been persuaded to continue with the interview, and Elesi's statement said:

> *"As soon as I enter the door the victim started laughing at me. I got a shock and asked her on why she was laughing at me, she shook her head and said nothing … Whilst asking her on what happen in the room she was smiling away and then she never look at me in the eye. I was asking myself on what did really happen. She … continued giving her statement and she just stood and walked around the office. I asked her what's wrong she did not answer my question but was smiling away and concentrating on her phone when it was out of power … She was also making fun of what had happened to her while having sexual intercourse. She was laughing away when I stopped writing and stared at her in a shocking face. I even asked her how her head is as she was saying before that it was aching. She said that it is o.k. and that she was never suffering from headache. She was smiling away … My overall*

[39] Pages 330-331 of the Record of the High Court.

observation on the victim when I was recording her statement she was not in a state of shock, emotional stress or depressed as normal rape victims. Her reaction and behaviour from the starting until the end of the statement kept me wondering whether she was mentally unfit at that point in time."

98. The second statement is that of Josua, the investigating officer which he made on 1 November 2012.[40] He said:

"I was looking from crime officer's office I saw the victim giving excuses to WSC Elesi. I thought that she was mentally unfit as the way she was acting. It's like there was nothing happened to her or for her to show sign of a rape victim. She stood up and tried to call on her phone outside and came back again. She was not showing any sign of distress. I then went to the charge room to inform Cpl Disiga the way the victim was acting in the crime office. Cpl Disiga then inform me that she had 2 cases which the victim lied to her about her report and her also being charged in Lautoka Police Station for giving false information."

99. It is surprising that Vili's lawyers did not try to elicit this evidence at the trial. I have already said that in many jurisdictions juries are directed that there is no typical response to rape, but this was nevertheless powerful evidence more than capable of casting doubt on Mere's credibility. It is a complete mystery to me why the defence did not try to bring this evidence out at the trial by asking the State to tender Elesi and Josua, or to call them themselves.

100. The other criticisms which have been made of Vili's lawyers are as follows. First, in his witness statement, Josua said that Mere had told him that

" ... the person who brought her to the barrack never dropped her back to the hostel after them having sex there. She was waiting for him outside and when she went to check for him again he was not there ..."[41]

[40] Pages 322-323 of the Record of the High Court.
[41] Page 323 of the Record of the High Court.

Vili's criticism of his lawyers is that this was never put to Mere, nor was it suggested to her that this was the reason why she had decided to make a false allegation of rape.

101. Secondly, Vili claims that before the trial he had told his lawyers that he wanted to give evidence. In their letter to the Chief Registrar, his lawyers did not expressly deal with that. What they said was this:

> *"Before the trial and after the prosecution closed their case [Vili] was advised on his right to give sworn testimony or remain silent. The consequences of both were explained to him. Hence he chose to remain silent."*

We asked Vili about that. He agreed that at the conclusion of the State's case his lawyers had indeed explained to him what his options were. However, they advised him that in their view it was unnecessary for him to give evidence in the light of the inconsistencies which had been exposed in the State's case. Vili told us that he reluctantly accepted that advice, but his criticism of them is that even with those inconsistencies they should have advised him that it would be better for him to give evidence because if he did not Mere's evidence would go uncontradicted.

102. Thirdly, Vili criticizes his lawyers for not producing the medical report on Mere or getting the doctor who examined her to give evidence. In his report the doctor had said that she had had no internal injuries. The doctor had added that Mere had told him that she had previously been sexually active, but had he been called to give evidence, it could have been put to him that forceful sexual intercourse was likely to leave some internal injuries even in a woman who was sexually experienced.

103. Fourthly, in Petero's witness statement, he described what Vili had been wearing when he saw Vili follow a woman out of After Dark. Vili had been wearing "half uniform long side pocket trousers and a Bula Shirt".[42] Vili claims that that was inconsistent with Mere's

[42] Page 342 of the Record of the High Court.

evidence that the man who raped her was wearing ¾ pants and no T-shirt.[43] Mere's evidence related to what the man had been wearing when he was lying on top of her, not what he had been wearing in After Dark, but Vili says that the difference between "half uniform long sided pocket trousers" and ¾ pants was too stark for the matter to have been overlooked. His lawyers, he says, should have highlighted that inconsistency in the course of the trial.

104. Fifthly, Vili says that his lawyers should have asked the judge not to start his summing-up to the assessors until Vili was in court. It was, he claims, too important a part of the case for the trial to proceed in his absence.

105. Sixthly, Vili criticizes his lawyers for not objecting to an amendment to the second charge. In the original form of the charge, no-one was alleged to have been involved with Vili in the attempt to pervert the course of justice. As a result of the amendment, Vili was alleged to have attempted to pervert the course of justice *with others*. Vili says that no-one else was in fact charged, and his complaint was that (a) they should have been charged, and (b) if they had been, and he had been tried with them, his chances of being acquitted would have been greater. His criticism of his lawyers is that they should have raised this with the judge.

106. Finally, Vili complains about the division of the work between the two lawyers who represented him at the trial. They were both members of the same firm. He had dealt with one of them in the course of preparing for the trial. It was she who commenced the cross-examination of Mere. However, Vili claims that she was so out of her depth that her colleague had to take over, and it was he who conducted the rest of the trial when he had not been involved in the preparation of the case for trial at all. That was why, so Vili claims, so many opportunities to challenge the State's case were missed.

107. In the interests of completeness, there are a number of matters which I have mentioned in this judgment which Vili's lawyers did not explore at the trial. I list them here because

[43] Page 378 of the Record of the High Court.

they also relate to the quality of Vili's legal representation, even though he has not specifically relied on any of them:

- Vili's lawyers did not ask for Mere to be recalled, once Pita had given his evidence, to ask her whether she agreed that she had only told Pita that she had been raped when she went to his home, and if so, why had she not mentioned that to him earlier when she was talking to Ledua.
- They did not require Josefa or Rogoele to give evidence to contradict Mere's evidence about where the room in which she had been raped had been.
- They did not cross-examine Mere on the inconsistency between her evidence and what she had said in her witness statement about the man who raped her having told her to sit on a mattress which was on the floor.
- They did not ask for Josua to be tendered as a witness so that he could be asked whether it had been possible for Vili to have been asked to go on an identification parade *before* Mere had seen him at the police station.
- They did not ask the judge at the end of his summing-up to give the assessors a direction on how to treat the dock identification or a *Turnbull* direction.

108. I make no comment at all on whether any of these criticisms are justified, and whether, if so, they could be said to have resulted in Vili not having a fair trial. That is because that was for the Court of Appeal to decide – if necessary, by requiring Vili and his lawyers to give evidence about these complaints. It would be wrong for the Supreme Court to usurp the role of the Court of Appeal in this respect. In the circumstances, I would remit the issue relating to the quality of Vili's legal representation at his trial to the Court of Appeal for a differently constituted court to determine whether he has been denied a fair trial on that account.

109. I have naturally considered with care the judgment of Gates J which I have had an opportunity to read in draft. He says that the appellate courts are not equipped to deal with complaints about one's legal representation at trial. I disagree. With the benefit of the procedure outlined in *Nilesh Chand*, they are. Recourse to the procedure under the Legal Practitioners Act is no substitute for that: it will not affect the defendant's

conviction. Gates J also says that much of what Vili claims is "only speculation" about why his lawyers took the course they did, but that is precisely what the remission to the Court of Appeal is intended to resolve. The course which Gates J proposes would be entirely appropriate if the criticisms made by Vili of his lawyers, if true, are not capable of amounting to flagrant incompetence on their part. In my view, though, they *are* capable of meeting that high threshold, but whether they in fact do or not is for the court ultimately to decide – if necessary by hearing evidence from both sides.

110. The delay in this case has been such that it is important for the momentum to be maintained. I would therefore make the following additional directions:

(1) Vili's lawyers should be served with a copy of this judgment within 21 days of the handing down of the judgment.

(2) They should file their response in writing to each of the complaints set out in paras 75-85 of this judgment in the Court of Appeal Registry, and serve a copy of it on Vili, within 42 days of the service on them of a copy of this judgment.

(3) Vili's remitted appeal against his conviction should be listed, as soon as possible thereafter, before a single judge of the Court of Appeal for the court to decide whether any person (whether Vili or either of the two members of the firm who represented him at his trial) should be required to attend the hearing of Vili's appeal in the Court of Appeal to be cross-examined.

(4) Vili's remitted appeal against his conviction should be listed before the Full Court as soon as possible thereafter.

111. For the reasons I have endeavored to give, I would dismiss all the other grounds of appeal against conviction.

The application for leave to appeal against sentence

112. Vili did not seek leave to appeal against his sentence when he applied to the Court of Appeal for leave to appeal against his conviction. It is only since the dismissal of his appeal against his conviction by the Court of Appeal that he has applied to the Supreme Court for leave to appeal against his sentence. It is because the State has accepted that one aspect of his sentence cannot stand that it is appropriate for the Supreme Court exceptionally to revisit his sentence.

113. The judge took 10 years' imprisonment as his starting point. He deducted 12 months for Vili's clear record and for the time he had spent in custody awaiting trial. He then deducted a further 12 months, as I have previously said, for the delay in bringing him to trial. The judge therefore passed a head sentence of 8 years' imprisonment, and he then imposed a non-parole period of 7 years. Although Vili initially challenged the judge's starting point of 10 years' imprisonment, the only feature of his sentence to which he now takes objection is the non-parole period.

114. Vili takes two points. First, he questions whether it was appropriate for the judge to have imposed a non-parole period at all. He cited what was said in *Nacani Timo v The State*:[44]

> *"A person with a previous good character or with minor prior offending may be an appropriate candidate to be allowed the benefits of the one third remission alone without an order for a period of ineligibility for parole."*

This statement was based on section 18(2) of the Sentencing and Penalties Act 2009, and was a perfectly correct statement of the law at the time. But it has been superceded by subsequent events. Section 18(2) has been repealed with retrospective effect, and the effect of its repeal was to make the imposition of a non-parole period mandatory in all cases, even in those cases in which the sentence was passed before the amendment took

[44] [2019] FJSC 22 at para 10 (*per* Gates J).

effect.[45] It follows that the judge can no longer be criticized for imposing a non-parole period.

115. Secondly, Vili complains that the non-parole period was too close to the head sentence. That complaint is justified, and the State agrees. As was said in *Tora v The State*:[46]

> *"The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent".*

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to 18 months. I would therefore reduce the non-parole period in this case to 6 and a half years. On a non-parole period of 6 and a half years, Vili would still be having to serve an extra 14 months after he would otherwise have been entitled to release on remission.

Conclusion

116. For these reasons, I would give Vili leave to appeal against his conviction on the basis that (a) his ground of appeal relating to delay involves a question of general legal importance, and (b) substantial and grave injustice may occur if he were not permitted to question the role his lawyers played at his trial. I would also give Vili leave to appeal against his sentence on the basis that substantial and grave injustice may occur if he were not permitted to contend that the gap between his head sentence and the non-parole period

[45] See *Kreimanis v The State* [2023] FJSC 19.
[46] [2015] FJCA 20 at para 2 (*per* Calanchini P).

was too short. In accordance with the Supreme Court's usual practice, I would treat the hearing of his application for leave to appeal as the hearing of the appeal, I would dismiss all his grounds of appeal against conviction, save for remitting the ground of appeal relating to the conduct of his lawyers at his trial to the Court of Appeal to be reconsidered afresh by a differently constituted court. For the purposes of the remitted appeal, I would give the directions set out in para 91 above. I would allow Vili's appeal against sentence, I would quash the non-parole period of 7 years specified by the High Court, and I would substitute for it a non-parole period of 6 years and 6 months.

Postscript

117. One of the difficulties in this case was identifying what the reasons were for the delay once the case had got to the High Court. That was because of the brevity of the judge's notes of what happened on the many occasions when the case was listed for mention. For example, the case was adjourned without a date being fixed for trial a number of times, but the judge did not note on any of those occasions why it had not been possible to fix a date for the trial then. I hope that in the future judges will make a fuller note of things like that.

Arnold, J

118. I have read the judgment of Keith J in draft. I agree with its reasoning and with the orders proposed.

Orders:

- Leave to appeal against conviction and sentence is hereby granted;

- Subject to para (3), all the petitioner's grounds of appeal against conviction are dismissed;

- The petitioner's appeal against conviction on the ground of lack of competence on the part of his lawyers is remitted to the Court of Appeal for that ground to be considered afresh by a differently constituted Court of Appeal;

- The Supreme Court Registry must serve the petitioner's former lawyers, Babu Singh & Associates, with a copy of this judgment within 21 days of the handing down of the judgment;

- Babu Singh & Associates must file their response in writing to each of the complaints set out in paras 75-85 of this judgment in the Court of Appeal Registry, and must serve a copy of it on the petitioner, within 42 days of the service on them of a copy of this judgment;

- The petitioner's remitted appeal against his conviction must be listed, as soon as possible thereafter, before a single judge of the Court of Appeal for the court to decide whether any person (whether the petitioner or either of the two members of the Babu Singh & Associates who represented the petitioner at his trial) should be required to attend the hearing of the petitioner's remitted appeal in the Court of Appeal to be cross-examined;

- The petitioner's remitted appeal against his conviction must be listed before the Full Court as soon as possible thereafter;

- The petitioner's appeal against sentence is hereby allowed;
- The non-parole period of 7 years is hereby quashed, and substituted for it is a non-parole period of 6 years and 6 months.

The Hon. Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court