IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0047 of 2023
[Court of Appeal No. AAU 0040 of 2019]

BETWEEN	:	**NIKOLA ROKOCIKA**
		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 Alipate Qetaki, Judge of the Supreme Court**
Counsel	:	**Petitioner in person**
	:	**Mr. S. Seruivatu for the Respondent**
Date of Hearing	:	**08 October 2025**
Date of Judgment	:	**30 October 2025**

JUDGMENT

Gates, J:

[1] This petition raises issues concerning the directions to be given on a witness's motive to lie, and on how to approach a conflict between the evidence of a prosecution witness and the evidence of a defence witness. There was a further question as to whether, when reduction of sentence has been made from the head sentence for time spent on remand, the distance between the remaining head sentence and the non-parole period was in step and sufficient.

[2] The petitioner had been tried by the Lautoka High Court for one representative count of penile rape contrary to section 207 (1) and 2 (a) of the Crimes Act. The offence was alleged to have been committed between 1st of May 2014 and 31st of August 2014. The petitioner was the stepfather of the 14 year old complainant V.R.

[3] Though one assessor had been discharged by the trial judge for absenteeism, the remaining two assessors unanimously tendered opinions that the petitioner was guilty of rape. On 4th of February 2019, the petitioner was found guilty by the judge. On 22nd of February 2019 the judge sentenced him to imprisonment for 16 years 7 months and 10 days with a non-parole period of 15 years to be served before he could be considered for release on parole. The judge made a permanent non-molestation and non-contact order to protect the victim under the provisions of the Domestic Violence Act.

The evidence at trial

[4] There were only 2 witnesses in the case, the complainant for the prosecution and the complainant's mother (the petitioner's wife) for the defence. In 2014 the complainant was living with her mother, her stepfather (the petitioner), and her 2 stepsisters aged 6 and 4, and a 2 year old stepbrother. Between 1st of May and 31st of August 2014 on a Saturday she was at home with the petitioner. Her mother was not at home. The complainant washed the dishes after lunch and then went to her bedroom to rest and read her bible.

[5] The petitioner entered the room, locked the door, and took off her skirt and panty. He pulled his pants down. She tried to push him away. He put his penis into her vagina. She felt her vagina was wet, and it was sore, because of what he had done. He then left the room. The mother returned in the afternoon.

[6] She told the mother that the petitioner had had sexual intercourse with her, and that she had been raped. She had gone to have a shower afterwards because she had seen blood stains on the mat and on her clothes. She noticed blood from her vagina and on her thighs.

[7] The second incident occurred also on a Saturday. She thought her mother had gone to get mussels from the river. The complainant was at home with her 4 year old stepsister, and

the petitioner. She was trying to make the sister go to sleep. The petitioner came into the room and closed the door. Again he raped her. She tried to push him away but she could not because he was a strong man. She did not consent. He told her if she told anyone he would beat her up.

[8] She told her mother about this. But the mother told her not to lie and not to be cheeky.

[9] Every Saturday the mother would go fishing. She took with her the complainant's older stepsister and her older siblings. On the third occasion the complainant was at home with the 4 year old and the petitioner. She was making the parents' bed when the petitioner came inside and locked the door. She tried to come out, but he had the key. He made her lie on the bed. She tried to push his hand away. He took off her clothes. He took off his pants and put his penis inside her vagina. It was painful to her. She said she did not agree to the sexual intercourse.

[10] She told her mother about this incident. She said "my mum beat me up with a hosepipe".

[11] The complainant was asked by prosecuting counsel how many children she had, and she said one. It was a boy and she said the petitioner was the father. She was asked "How do you know that your stepfather Nikola is the father of your son?", and she answered "He was the only one who had sexual intercourse" with her. She said she had had only one sexual partner that was Nikola Rokocika. She said for all three occasions she had not consented to him doing this.

[12] It was suggested in cross-examination that the sex between the petitioner and herself was consensual. She denied it, and she denied consenting to the two other incidents.

[13] It was suggested to her that the only reason, "for putting up this story is because you got pregnant from Nikola". She denied that allegation.

[14] The petitioner elected to remain silent. Instead, he called his wife, the mother of the complainant.

[15] The wife said she had been married to the petitioner for 14 or 15 years. VR was her daughter from a previous relationship. She said this matter came to light when the complainant got pregnant. She noticed bodily changes and it seemed VR was not having her period. She told her daughter that she was pregnant. The complainant did not say anything. Then she asked who was the father, and again VR did not say anything.

[16] The wife asked whether the petitioner was the father. The complainant said no. The complainant's mother maintained that she had not done anything to the complainant. She also maintained that the complainant had not told her anything about her and Nikola having sexual intercourse. She denied being shown blood on the mat, and denied beating her up with a hosepipe.

[17] In cross-examination, the mother admitted she was financially and emotionally dependent on her husband. She also admitted that when she took the complainant to the hospital, she told the complainant to say the father's name was Peni. When confronted with certain parts of her statement to police, she denied giving that statement to the police, though she admitted the signature on it was hers. The statement had said the petitioner had told both her and the complainant not to give his name at the police station, but instead to say a boy called Peni raped her. The wife said she suspected the petitioner "did something to VR, so I asked VR at Nadi Police Station if Nikola raped her, and she said yes."

[18] She said the complainant had not told her anything about their intercourse. But she admitted she had asked the complainant whether Nikola might have done something to her because he was her stepfather. She said she only came to know of what happened when the complainant's statement was taken at the police station. She denied ever asking the petitioner whether he had raped the complainant.

Before the Court of Appeal

[19] On 26th of October 2021 the application for leave to appeal in the Court of Appeal was refused by the single judge for both conviction and sentence. The application was late by about 2 weeks, nonetheless the judge had considered the matter.

[20] The petitioner renewed his application before the Full Court, which on the 29th of November 2023 also refused leave to appeal against conviction and sentence. The petitioner had lodged 6 new grounds.

Petition to the Supreme Court

[21] A timely petition was lodged against the decision of the Court of Appeal. Three of the grounds before the Court of Appeal against conviction were repeated in the petition, and one new ground was put forward against sentence.

[22] Ground 1 complains that the trial judge failed to make an independent assessment of the evidence and significantly to look at the totality of the evidence on the issue of consent.

[23] This ground was dealt with by the single judge though the ground before us, and the submissions made, were different. The judge referred to comments in **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) in considering a trial judge's function when agreeing with the assessors:

> *"[20] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014), Kaiyum v State [2014] FJCA 35; AAU0071.2012 (14 March 2014), Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) and Kumar v State [2018] FJCA 136; AAU103.2016 (30 August 2018)]*
>
> ……
>
> *[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial*

judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonably be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge."

[24] At paragraph [12] the single judge concluded:

> *"[12] None of these complaints hold much water. To start with, the trial judge was under no obligation to independently assess the evidence once again after his summing-up except briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as a sound and best practice in order to demonstrate that he had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse. It is a much less onerous task than engaging in a full-fledged independent analysis of the evidence as in a situation where the judge disagrees with the assessors."*

[25] In his written submission to this court, the petitioner made several points which he no doubt considered should have gone in his favour from any assessment. For instance, he argues that the issue of non-consensual intercourse was only raised when the complainant was a few months pregnant. That was not the evidence. The complainant testified that she complained to the mother who disregarded her complaints of forced sexual intercourse. At that stage, the pregnancy was not known. She complained immediately after each of the three incidents, on the same day, when the mother returned in the afternoon.

[26] The submission criticised the complainant "for opting to stay home whenever the mother was absent." It was suggested no witness was called to support the complainant's evidence to show consistency and credibility. There was evidence for consideration once the complainant had complained to her mother.

[27] That evidence of complaint had fallen on hostile ears. If the complainant was to be believed, the mother had chosen to protect her husband not her own daughter. The

submission suggested that by staying at home when the mother was not present, the complainant had "successfully assumed consent", and that by living in the same house over a span of time also she had successfully assumed consent. The summing up adequately dealt with the issue of consent. It must be remembered that though there was evidence of unwanted forceful sexual intercourse given by the complainant, there was no contrary evidence for the assessors and judge to consider that those acts had been carried out with the complainant's consent. The only other witness, the mother, never saw the incidents, and the petitioner had exercised his right not to give evidence. The questions will have been, was the complainant a credible witness, was she rightly believed, and had the prosecution proved its case against the petitioner beyond reasonable doubt. The judge had summarised the case fairly on all of the issues. This ground fails.

Failure to give a Jovanovic Direction

[28] The petitioner urges that a direction should have been given by the judge to the assessors on how to consider the evidence of a motive to lie on the part of the complainant. In cross-examination of the complainant defence counsel suggested the sexual intercourse between the petitioner and the complainant had been consensual. The complainant denied the suggestion. The following then took place:

> *Question:* *And the only reason for putting up this story is because you got pregnant from Nikola?*
>
> *Answer:* *No my Lord he raped me.*

[29] The only other witness, the mother, called by the defence, said the complainant had not told her at any time anything about her and the petitioner having sexual intercourse. The trial issue was of course only about consent, not sexual intercourse.

[30] Nothing more was made of this suggestion of motive to lie in either of the cases for the prosecution or the defence. No mention was made of it in counsel's closing addresses. No directions or re-directions were sought from the judge along the lines of the various judgments in **R v Jovanovic** (1997) 42 NSWLR 520. That judgment was not concerned with the trial issue here, which was, had the complainant told the truth about the non-

consensuality of the sexual intercourse with the petitioner there having been no contrary evidence led. Instead they were dealing with what was said to be the impermissible question *"why would the complainant lie?"*.

[31] That approach to the credibility of the complainant was never raised or followed up in the instant case. The allegation was never pursued or developed in evidence or in cross-examination. There was certainly no other supportive or illustrative evidence. Neither side had indulged in what was described in ***Jovanovic*** as "illegitimate speculation".

[32] In his summing up the trial judge, having earlier dealt with the defence case, summarised the defence:

> *"68. The accused on the other hand denies having sexual intercourse with the complaint without her consent.*
>
> *69. The defence position is that the accused had consensual sexual intercourse with the complainant on all the occasions. The allegation of rape only emerged after the complainant found out that she was pregnant.*
>
> *70. The defence is also saying that the complainant did not complain to her mother about what the accused was doing to her and had not shown her mother any blood stains on the mat as mentioned by the complainant. The defence maintains the complainant only cried rape after she became pregnant."*

[33] His Lordship in his charge to the assessors on the burden of proof said:

> *"75. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
>
> *76. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
>
> *77. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

[34] In this case there was only one witness testifying as to what had occurred on the three occasions. There was no evidence supporting what were merely defence questions put in cross-examination, suggesting consent. The assessors and the judge had to decide whether they accepted or rejected the complainant's evidence, and whether they were sure that the prosecution had proved its case beyond reasonable doubt.

[35] I conclude this is a case, which Sperling J at page 542 in ***Jovanovic*** foreshadowed, where it was not necessary to give a particular direction involving the complainant's evidence. This ground fails.

Burden of proof: Liberato Directions

[36] After the assessors had delivered their opinions, the judge provided his judgment. In it he gave his reasons for accepting the testimony of the complainant and for disbelieving that of the mother. At paragraph 30 he said:

> *"The defence had not been able to create any reasonable doubt in the prosecution case."*

[37] This observation, not addressed to the assessors, was infelicitously expressed. It might have suggested that the defence had failed in its burden of disproving the prosecution case. The judge well knew there was no such burden. At paragraphs [8] and [9] of the summing up the judge had adequately put the burden to the assessors, informing them that the burden of proof never shifts to the accused. The accused bears no burden to prove his innocence, and that any reasonable doubt about his guilt must result in a not guilty verdict.

[38] At paragraph 48 in dealing with the defence case, the judge repeated his direction that the accused does not have to prove anything, and at all times the burden remains on the prosecution. He dealt with the accused's right to silence and that his election was not to be considered adverse to his interests. I have already referred to the judge's final charge to the assessors on burden at paragraphs 75, 76, and 77 of his Lordship's summing up.

[39] In ***Liberato v R*** [1985] HCA 66; 159 and 507 (17th October 1985) the issue had been misdirections of the trial judge. Deane J at paragraph 8 of his judgment, whilst not favouring choosing between witnesses, put this stress on the correct approach:

> *"…the members of the jury were satisfied not only that, as a matter of choice, they accepted the evidence of the complainant in preference to the evidence of the accused but that it was plain beyond reasonable doubt that the evidence of the complainant should be so accepted…"*

[40] In the joint judgement of Gummow and Hayne JJ in ***Murray v the Queen*** [2002] HCA 26 (20th June 2002), it was said at 57:

> *"The question was whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt. This required no comparison between alternatives other than being persuaded and not being persuaded beyond reasonable doubt of the guilt of the appellant."*

[41] Choice was not in issue in this case because there was only one witness who had testified and who could speak on the issue of consent.

[42] In his dissenting judgement in **Liberato**, Brennan J had said:

> *"11. When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue."*

[43] Uncertainty or disbelief of issues brought up by the defence may mean the prosecution has not proved its case. The trial judge made that clear at the end of his summing up:

"even if you reject the version of the defence, still the prosecution must prove this case beyond reasonable doubt."

[44] For the evidence adduced in this case, the judge's summing up and directions were adequate and sufficient. This ground must fail.

Sentence, The Non-Parole Period

[45] The petitioner received a sentence of imprisonment of 17 years (effectively 16 years 7 months and 10 days after deducting the time the petitioner had been in custody on remand). The non-parole period was fixed at 15 years.

[46] Before the Court of Appeal, the petitioner had argued that his sentence was harsh and excessive or disproportionate to the gravity of his offending. He said the judge had not taken into account his full mitigation including the fact that he was a first offender. The judge had granted a discount of 1 year for his "good character". This discount was not approved by the Court of Appeal on the basis that the petitioner had raped not once but on three separate occasions. Prematilaka J also queried whether sexual offenders of children should receive any discount for being first time offenders.

[47] In his written submission the petitioner claims the imposition of a non-parole period in the absence of a parole board was unsatisfactory and unconstitutional.

[48] Though the establishment of a parole board is obviously desirable, the lack of one is not unconstitutional.

[49] In calculating the sentence the judge arrived at a sentence of 17 years imprisonment. He reduced that figure to 16 years 7 months and 10 days for the time spent on remand. It was after the deduction that the judge went on to fix the non-parole period of 15 years, just short of 18 months less than the head sentence.

[50] Was the methodology correct in the timing of when to grant the reduction of time spent on remand? In ***Aitcheson v The State*** CAV 0012.2018 (2nd November 2018) the court said:

> *"[9] The Supreme Court has favoured the approach to granting the discount to be that the remand time is to be dealt with last. Once the term and non-parole period is arrived at, then the court will set out a suitable discount.*
>
> *[10] In **Sowane** [2016] FJSC 8 CAV0038/2015 21st April 2016 the final orders were as follows:*
>
> > *"(a) The sentence imposed by the Court of Appeal for manslaughter of 12 years with a non-parole period of 10 years is confirmed.*
> > *(b) Considering the time spent in custody awaiting trial, the remaining period to be served is to be:*
> >
> > *Head Sentence : 10 years 8 months*
> > *Non-parole period : 8 years 8 months."*
>
> *[11] In this way it is transparently clear, not least to the petitioner but also to the Corrections Department, what has to be served."*

[51] Had this been done, the judge might well have granted a non-parole period with a 2 year discount from the head sentence, thus allowing time in a lengthy sentence such as this, for rehabilitation.

[52] Before parting with the case, I refer to a late lodging of a Notice of Additional Grounds of Appeal and submission against conviction, received in the registry on 10th September 2025. This was 1 year 8 months out of time. It seemed the notice had not been received by the State, and was not addressed in counsel's submissions, nor indeed orally by the petitioner.

[53] It claimed the trial judge was in error for not directing the assessors to consider the counts in the information separately. This was a representative count, albeit there were three incidents referred to. It was not necessary that such a direction be given for a

representative count. The defence was not challenging that sexual intercourse had taken place. The sole issue was consent.

[54] It often happens that an unrepresented petitioner is allowed a certain leniency on procedural matters. However, filing extra grounds at the last minute, shortly before the hearing means the court will not have the necessary guidance and submissions from the State. This is disorderly and undermines an efficient approach to the work of the court. Such late filings are unlikely to be looked on with favour or be granted enlargement of time.

[55] There is no merit in this application and the ground must fail. The application is dismissed.

Conclusion

[56] Special leave is to be declined for all grounds against conviction. Leave is granted for Ground 4 against sentence. The question of the correct approach to fixing non-parole periods to allow for rehabilitation is a substantial question of principle pursuant to section 7 (2) (b) of the Supreme Court Act. The non-parole period of the sentence is to be quashed and substituted with a non-parole period of 14 years 7 months.

Keith, J:

[57] I agree with the judgment of Gates J. There is nothing I can usefully add.

Qetaki, J:

[58] I have read the judgment of Gates J, in draft and I agree with it and the reasoning.

Order of the Court:

1. *In the result the orders are:*

    1. *Special leave declined on all grounds, save sentence [Ground 4].*
    2. *Petition against conviction dismissed.*
    3. *Petition against sentence allowed.*
    4. *Sentence quashed.*
    5. *Sentence substituted:*

Head Sentence : 16 years 7 months 10 days.

Non-parole period : 14 years 7 months.

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court

Solicitors:

Petitioner in person
Office of the Director of Public Prosecution for the Respondent