IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0002 of 2024
[Court of Appeal No. AAU 079 of 2019]

BETWEEN : **SOSICENI NAULU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice Salesi Temo, President of the Supreme Court**
The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **04 April 2025**

Date of Judgment : **29 April 2025**

JUDGMENT

Temo, P:

[1] I agree with His Lordship Mr. Justice Gates judgment and conclusions.

Gates, J:

Introduction

[2] The petitioner, whilst incarcerated, had lodged with the Supreme Court registry a handwritten petition dated the 13th of December 2023. It was received and stamped on 25th January 2024. It is to be considered a timely petition appealing the decision of the Court of

Appeal delivered on the 29th of November 2023. The document, enclosed with the Corrections Department covering letter, comprises a series of grounds of appeal against conviction mixed with submissions, and purportedly against sentence.

[3] On the 16th of May 2019, the judge, in agreeing with the minority assessor, had convicted the petitioner after trial in the Lautoka High Court, of a single count of digital rape, contrary to section 207 (1) and 2 (b) of the Crimes Act. On the 30th of May 2019 the judge sentenced the petitioner to a term of imprisonment of 11 years 7 months with a non-parole period of 10 years.

[4] On two occasions during the course of the proceedings in the Court of Appeal, the petitioner had filed a Form 3 application [Rule 39 of the Court of Appeal Rules], which he had signed, in order to abandon his appeal against sentence. The first was filed on the 10th of September 2020, and the second on the 25th of February 2021. Both of these notices were noted by the single judge in his ruling, and on the 8th of March 2021, his lordship refused leave to appeal against conviction.

[5] The Full Court had referred to the petitioner's expressed intention to abandon his appeal against sentence, and proceeded to determine his remaining appeal against conviction.

[6] Nothing further seems to have happened in the Full Court or for the court to hear directly from the petitioner himself as to the circumstances surrounding his intention to abandon the sentence appeal. The Full Court has yet to make a formal order accepting the petitioner's reasons for abandonment and for the court to then dismiss the sentence appeal. These reasons would have emerged at the abandonment hearing following the procedure as laid down in **Masirewa v The State** [2010] FJSC 5 CAV 0014.2008S.

[7] Section 35 of the Court of Appeal Act grants certain powers to a single judge of appeal in the criminal division. These do not include ordering the dismissal of an appeal. That power resides solely with the Full Court. But in this case, the Form 3 Notice of Intention to Abandon the Sentence Appeal, appears to have been overlooked.

[8] The formal application in this case must be remitted to the Court of Appeal for it to complete the exercise of its jurisdiction to deal with his appeal against sentence, and its abandonment, if that is still the petitioner's intention. The petition before us included grounds to argue against his sentence. Orally, he informed us that he had signed the form, "because the legal aid told me that the charge would be reduced to sexual assault". This matter needs to be listed now before the Full Court, as a matter of urgency, and completed.

Restricted Jurisdiction of the Supreme Court

[9] It is often thought that the Supreme Court is merely another appellate court in which unsuccessful appeals to the Court of Appeal can be re-argued in order to achieve a more favourable result. That is not so. Section 7 (2) of the Supreme Court Act prohibits the granting of special leave to appeal in a criminal matter unless the petitioner can bring his or her appeal within one or more of the following circumstances. They are:

> *(a) a question of general legal importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial and grave injustice may otherwise occur.*

[10] I will now consider these criteria alongside the evidence, the grounds, and the submissions presented to us.

The evidence

[11] At trial, the petitioner was represented by counsel. The prosecution called 3 witnesses. The complainant gave sworn evidence. She lived at Narewa Village, the village of her birth, with an uncle and aunt. At around 3am on the 19th of March 2015, another of her uncles, Seremaia Teka, asked her to go and fetch some more grog and cigarettes from a nearby shop within the village.

[12] As she came back and went past the petitioner's home, the petitioner called out to her. He had been sitting outside and he asked her for a cigarette. She went to a nearby house to try

to obtain some more cigarettes, but no one answered. Instead, she offered the petitioner a cigarette from the packet she had already purchased for her uncle.

[13] They went to smoke the cigarette on her grandfather's concrete footpath the surface of which she said was dirty. She noticed the petitioner smelt of liquor. As she was about to leave, the petitioner pushed her down, took off her pants, and "fingered her on her vagina". She called out to her grandmother, but no one came. The fingering took about two minutes. She had been wearing a red 3/4 shorts and a white T-shirt. She said he did that forcefully to her and that she was afraid. The petitioner is a tall person of robust build. The complainant was aged 27 years. The petitioner, also living in the village, had been known to the complainant for a long time.

[14] After that, she returned to her uncle, Seremaia Teka. She said she told him everything. He had asked her what had happened. Her uncle was angry about what had occurred. It was suggested in cross-examination that she had not told the uncle about the petitioner forcefully inserting his fingers into her vagina. She insisted that she had told him. It was put to the complainant that, "Sosiceni had forcefully assaulted you and taken your 3/4 shorts". The complainant said, "Yes, he took my 3/4 and some change".

[15] Because the petitioner had kept her shorts she tried to find a sulu to wear to cover herself and instead took a towel and wore that. Whilst resisting she said she had shouted out for her grandmother. The petitioner held her by one of his hands whilst he inserted his fingers. She pushed him. There had been no prior talk about sex. He just pushed her down, she said.

[16] The complainant's uncle next gave evidence. He had lived all his life in the village. He had asked the complainant to go to buy some more grog and cigarettes since they had finished. They were waiting for her return. When she arrived, he noticed her clothes were dirty and that she only wore a towel. He asked her where were the things that she was sent to buy. She said the petitioner had taken them and that she did not have anything with her. He said when he saw her clothes were dirty he asked her what had happened. She then told him.

[17] He was asked what did she tell you. He said the petitioner had called her and asked for a roll. He had asked her to buy a roll, but there was none to be had. So she opened the packet that she had with her. He had told her to go and smoke beside one of the houses. When they were there the petitioner pulled her, took off her shorts "and did that act on her". This act he said was that he had touched her vagina. Seremaia asked the complainant why didn't she shout "because we didn't hear anything". The complainant had replied that she had called out for one of Seremaia's aunts, likely the grandmother that the complainant had referred to, but because it was the early hours of the morning, everyone was asleep so no one heard her.

[18] Seremaia said he knew the petitioner very well and that they met often in the village. They were cousins.

[19] Seremaia was asked whether he had told the police that the complainant had said the petitioner had touched her vagina. He said he had not told them in detail, he had not really told them what the complainant had told him. He said, "I did not tell them what Sosi did to her, that he touched her".

[20] The third witness for the prosecution was Detective Constable Setareki Gavidi. On the 31st of December 2015, he was instructed to formally charge the petitioner. He did this with PC Setareki Nabeqa, as witnessing officer. After following the usual procedures for this stage of the investigation, he recorded his statement and made an English translation [Exhibit 1A].

[21] DC Gavidi read out the allegation to the petitioner:

> *"Sociceni Vatunitu, you are now for charge for the offence of Rape: Contrary to section 207 (1)(2)(b) of the Crime Decree No. 44 of 2009 that you on the 19th day of March, 2015 at about 3am at Narewa Village, Nadi, you penetrated the vagina of Torika Tabua aged 27 years, domestic worker of Narewa, by inserting two of your fingers without her consent.*
>
> *"Do you wish to say anything? "You are not obliged to say anything unless you wish to do so but what you say will be taken down into writing and maybe given in evidence"."*

[22] The petitioner was asked if he understood the charge and the caution put to him, and he answered 'yes'. He was asked if he wished to make a statement, and he said 'yes'. He then made a short statement which was:

> *"I admit what I have done to T after I saw her on the ID Parade and I wish to apologize for what I have done, to her and everyone who may have hurt. I also wish to apologize to the court for my actions."*

[23] The witness was asked in cross-examination whether the petitioner had admitted having raped or inserted his finger into the vagina of the complainant, and he answered 'no'. He also said he had not clarified what the petitioner was apologising for. That was the case for the prosecution.

[24] The petitioner was called on to make his defence. He elected to remain silent, which was his right under the Constitution [section 14 (2) (j)].

Consideration of the grounds

[25] The grounds in the petition document are not necessarily the same as in the submissions filed. At times it is difficult to discern exactly what the ground of complaint is aiming at. In the Court of Appeal he raised two grounds. The first had alleged the trial judge had failed to give cogent reasons for differing from a majority decision of the assessors. He raises this issue again before us.

[26] The second ground had been whether the judge was correct to classify the difference in Seremaia's evidence in court by the statement he made to the police as an omission as opposed to an inconsistency.

Cogent reasons

[27] Until recently, judges in Fiji presiding over criminal trials in the High Court, sat with assessors. The assessors were not the same as jurors, but they tendered their opinions individually to the judge on guilt or innocence of the accused. Though the opinions of the

assessors were important to the process, the final say on the facts and law always resided with the judge [Section 237 (2) Criminal Procedure Act [CPA]].

[28] In this case, the judge complied with Section 237, including Section 237 (4) which requires him or her to give reasons for differing from the majority opinion of the assessors [***Lautabui v State*** [2009] FJSC 7; CAV0024.2008 (6 February 2009)]. In that case the Supreme Court had said:

> *"When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications. First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have 'cogent reasons' for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of the witnesses:* ***Ram Bali v Regina*** *[1960] FLR 80 at 83 (FCA), affirmed* ***Ram Bali v The Queen*** *(Privy Council Appeal No. 18 of 1961, 6 June 1962)"*

[29] Following the delivery of the opinions of the assessors, the judge adjourned the matter. He then reflected overnight on his decision. In his judgment, he examined the evidence carefully and set out why he accepted the prosecution witnesses evidence. In exercising his right not to give evidence, the petitioner had not therefore provided an alternative account of events that day. Of course he was not obliged to do so. The burden of proving the case always remained throughout with the prosecution. Without his own testimony the petitioner had to establish his case, if he could, through the cross-examination of the prosecution witnesses.

[30] The judge set out his views of the evidence and the reliability of the witnesses [Judgment Record 45]:

> *"20. I accept the evidence of all the prosecution witnesses as truthful and reliable. The complainant was able to recall and narrate what the accused had done to her some four years ago.*
>
> *21. I accept that the complainant was afraid of the accused when he forcefully removed her shorts and inserted his fingers into her vagina. I also accept that the complainant had shouted for help but there was no one around during the early hours of the morning to help her. This court rejects the contention of the defence that the complainant did not shout for help inferring that nothing had happened. There is no requirement of the law for a complainant to shout or yell to show his or her resistance towards an unexpected sexual encounter.*

> *22. I accept the complainant had told her uncle Seremaia Teka what the accused had done to her. This court has no doubt that the complainant told the truth in court her demeanour was consistent with her honesty. She was a straight forward witness who was not discredited during the cross-examination.*
>
> *23. Seremaia Teka also told the truth in court when he said he did not tell everything in detail to the police. A person cannot be expected to narrate word for word what he had been told 4 years ago. In any event Seremaia did tell the court about relevant and material information pointing towards the unlawful sexual conduct of the accused. The inconsistency between the evidence of the complainant and the witness Seremaia in this regard does not adversely affect the reliability of the complainant's evidence."*

[31] The judge has provided cogent reasons for his decision, and in doing so, conformed with the requirements of section 237 (4). This ground must fail.

Need for voir dire for charge statement

[32] The petitioner has argued that the charge statement, wherein he made the apology statement, should have been subjected to a voir dire procedure before the judge could admit it into evidence. In the interlocutory stages of the proceedings prosecuting counsel had informed the mention judge [R157 13th May 2016] that the prosecution would be relying on the charge statement. On the 12th of March 2018, the trial judge was informed by defence counsel [R164] that after having taken instructions from the petitioner, there would be no need of a voir dire. This meant that there was no challenge to the voluntariness of the statement given by the petitioner to the investigating police officers, and no objection to its admission into evidence at the trial. This ground therefore fails.

Lack of Medical Report

[33] Often in sexual crimes a complainant is referred to a doctor for examination. Sometimes, if injuries are discovered on the victim's body, the complainant's evidence may be supported by this evidence. But not all cases will establish such support. In this case, no medical evidence was tendered. The complainant had said the petitioner inserted his fingers into her vagina for about two minutes. She had not given any evidence to state she had been in pain after the incident or that she had suffered any injury.

[34] There is no law that makes it imperative that a complainant's evidence must always be supported by medical evidence. This ground fails.

Recent complaint and Corroboration

[35] PW2, Seremaia Teka gave evidence of the re-appearance of the complainant at his house. She had returned after being asked by her uncle to fetch some more grog and cigarettes. Besides her having taken so long, Seremaia also noticed that she was wearing only a towel, not a sulu, and that her clothes were dirty. He also told the court of the account she gave to him of what had happened to her in the intervening time.

[36] Seremaia can give admissible evidence of the state of her clothes. This is something that he saw directly. Usually, the evidence of what another witness told him would be inadmissible as hearsay because he himself had not witnessed those events. But this evidence is admissible here to a limited extent namely as recent complaint evidence.

[37] In ***Raj v State*** [2014] FJSC12; CAV0003.2014 (20 August 2014) it was said:

> *"[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint:* ***Kory White v. The Queen*** *[1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
>
> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph."*

[38] And its purpose and value was referred to [***Raj*** paragraph 33]:

> *"[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v. Whitehead*** *(1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness:* ***Basant Singh & Others v. The State*** *Crim. App. 12 of 1989;* ***Jones v. The Queen*** *(1997)*

191 CLR 439; ***Vasu v. The State*** *Crim. App. AAU0011/2006S, 24th November 2006."*

Rape or sexual assault

[39] Through his submission the petitioner was urging us to find this was a case of sexual assault, not rape. Orally, he submitted the charge should have been sexual assault since there was only touching as opposed to penetration. His counsel at trial made much of the lack of detail given to Seremaia by the complainant when she returned home and reported what the petitioner had done to her. Defense counsel did not suggest in cross-examination, the touching, that this was in fact what the petitioner had done to the complainant.

[40] Complaint is made of the inconsistency of Seremaia's account concerning what the complainant told him with that of the complainant herself. She maintained she told him everything. It was suggested that she had only said there was touching not penetration. The judge did not accept that view. He believed that both the complainant and the uncle had told the truth. Seremaia did not give the police all of the detail, but the judge considered there was a sufficiency in the account that supported the complainant. If there were any inconsistencies these did not affect adversely the reliability of the complainant's account. The judge had correctly pointed out the inconsistencies.

[41] It was not necessary for the complainant to describe the full extent of the unlawful sexual conduct providing her account to the uncle supported her own credibility [see ***Raj*** supra at paragraph 39]. Nor was it necessary for the judge to identify and to find corroboration of her account. The necessity for finding corroboration of a complainant's evidence in a sexual offence was removed by section 129 of the CPA. The recent complaint evidence and the credibility of the complainant were approached by the judge entirely correctly. This ground must fail.

[42] It must be borne in mind that in Fiji, in the rural areas and villages, witnesses who relate sexual acts committed upon themselves have a shyness and reticence to expand on the unwanted intimacies they have suffered. This has been the experience of the courts. This can be more so where a younger female has to make a report to an older male relative.

Conclusion

[43] The petition against conviction does not meet the threshold required for leave to be granted under section 7 (2) and the grounds must all fail.

Goddard, J:

[44] I am in complete agreement with the findings and conclusions in Gates J's learned judgment.

Orders of the Court:

1. *Leave to appeal refused.*
2. *Petition declined.*
3. *Conviction affirmed.*
4. *The application to abandon the sentence appeal before the Court of Appeal, not yet heard, to be listed before the Full Court as a matter of urgency.*

The Hon. Mr. Justice Salesi Temo
President of the Supreme Court

SUPREME COURT FIJI

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Madam Justice Lowell Goddard
Judge of the Supreme Court

Solicitors:

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