IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0007 of 2021
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0156/2015; High Court No: HAC 104 of 2013]

BETWEEN: **SAKEASI SAULEQARAKI**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court**
The Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: **Mr. M. Fesaitu for the Petitioner**
Ms. P. Madanavosa for the Respondent

Date of Hearing: **14th and 19th June, 2023**

Date of Judgment: **29th June, 2023**

JUDGMENT

Jitoko, J

[1] I have had the advantage of reading the draft judgment of Qetaki J in this appeal and I agree with his reasoning and conclusions and with the orders proposed.

Mataitoga, J

[2] I have read the judgment of Qetaki JA. I agree with reasons and the conclusion.

Qetaki, J

Background, Court's jurisdiction and power

[3] The Petitioner has sought leave of this Court to appeal against the judgment of the Court of Appeal (***Prematilaka JA, Bandara JA and Wimalasena JA)*** dated 25 June 2021.The Petitioner was indicted in the High Court at Suva with two counts of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

[4] The offence of rape is defined in section 207 of the Crimes Act 2009 ("the Act") as follows:

"207. (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if:

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of other person to any extent with the person's penis without the other person's consent."

[5] The Petitioner relies on the exercise of this Court's jurisdiction and powers as set out in section 98 of the Constitution of the Republic of Fiji. Subsections (4) and (5) of Section 98 of the Constitution state:

"(4) An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

(5) In the exercise of its appellate jurisdiction, the Supreme Court may-

(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal, or

(b) make any other order necessary for the administration of justice, including an order for a new trial or an order awarding cost."

[6] The powers of this Court to deal with the application for special leave to appeal are set out in Section 7, subsection (2) of the Supreme Court Act, which states:

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:

(a) a question of general legal importance is involved;

(b) a substantial question of principle affecting the administration of criminal justice is involved;

(c) substantial and grave injustice may otherwise occur."

[7] The Petitioner has to establish that his request for grant of special leave to appeal comes within the ambit of the Act. The threshold for granting special leave by the Supreme Court is very high as set out in **Livai Lila Matalulu and Another v Director of Public Prosecutions** [2003] FJSC 2:

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."*

Facts:

[8] The particulars of the offences are as follows: -

Count One: SAKEASI SAULEQARAKI on the 14th day of January 2013 on Gau Island in the Eastern Division had carnal knowledge with Arieta Radinidravuwalu, in that he penetrated the vagina of the said Arieta Radinidravuwalu, without her consent.

Count two: SAKEASI SAULEQARAKI on 14th day of January 2013 on Gau Island in the Eastern Division penetrated the vagina of the said Arieta Radinidravuwalu with his fingers, without the said Arieta Radinidrarvuwalu's consent.

[9] The complainant was 18 years old at the time of the incident. The Petitioner (accused) is the complainant's uncle (her father's younger brother). At the material time the complainant was with the Petitioner and his family at Nawaikama village in Gau Island. The complainant went to her father's elder brother's house at Somosomo on 09 January 2013. On 14 January 2013. The Petitioner visited Somosomo with other villagers. To get back home, the Petitioner and the complainant left for Nawaikama at around 9.00pm by foot. According to the complainant while they were on their way, at Delainaniu, the Petitioner penetrated her vagina with his penis without her consent and at Nokobua, he penetrated her vagina with his fingers without her consent.

[10] The Petitioner's position was that he penetrated the complainant's vagina with his penis with her consent. The complainant had maintained that she was frightened by what the accused (Petitioner) was doing and she had expressed her unwillingness by making the sound '*mmm'*, an expression of disapproval. The accused (Petitioner) denied penetrating her vagina with his fingers at Nokobua.

[11] Following the trial before Perera J. on 27 November 2013 the assessors unanimously opined that the Petitioner is guilty of both counts of rape. However, the learned trial Judge disagreed with the assessors thus overturning their opinion, and acquitted the Petitioner on both counts of rape.

Before a Single judge of Appeal

[12] Dissatisfied with the decision of the learned Trial Judge, the Director of Public Prosecutions appealed the judgment to the Court of Appeal. There were five (5) grounds of the application to appeal whose cumulative effect is that they are directed at the fact that the learned Trial Judge had failed to adduce cogent reasons to substitute his decision to overturn the opinion of the assessors and thereby to acquit the respondent. The learned single judge stated that the manner in which the disagreeing judge should approach the issues has been well articulated in the decisions of **Ram Bali v Reginam** [1960] 7 FLR 80 and 83 (Fiji, CA), **Shiu Prasad v Regina [**1972] 18 FLR 70 at 73**, Johnson v State**

[2013] FJCA 45; AAU 9.2010 (30 may 2013). Essentially, these cases make it clear that the judges 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 witnesses.

[13] The single judge found that there were arguable points based on the facts, he was referring to the learned trial judge's conclusion that *"there was no evidence of any circumstances which shows that the accused knew that the complainant was not consenting or he did not care whether she was consenting"*. The other arguable point based on facts referred to in paragraph [13] of the Ruling (Gamalath, JA), as follows:

> *"……one cannot overlook the undisputed evidence that while the victim was being subjected to the alleged sexual abuse, the accused (respondent) had been repeatedly asking the victim (complainant whether "she liked what he was doing". In that context, the conclusion which the learned trial judge had drawn in paragraph [12] of the judgment has been that "the complainant herself creates a reasonable doubt in my mind on whether the accused knew or believed that she was not consenting'; this an arguable matter that cannot be resolved without examining the entirety of the evidence and the attendant circumstances relating to this case. In that context the manner in which the learned Trial judge had ruled out the possibility of having non-consensual sexual intercourse is a question that needs to be addressed. It indeed is relevant to decide the existence of consent and further it involves a question of mix law and facts relating to this leave application."*

[14] The learned single judge in the leave to appeal ruling had made the following pertinent remarks when considering the respondent's appeal against the trial judge's findings and decision in the overturning of the unanimous opinion of the assessors based on the issue of consent:

> *"[14] As could be gathered from the Summing Up and the judgment, the relationship between the accused (respondent) and the complainant (victim) was based on a hierarchical order, in which the accused (respondent) held power over the complainant (victim) and the complainant, who was living under the care of the accused (respondent) may have been subjugated under his power. The unequal social structure that had existed between the accused person (respondent) and the complainant (victim) may have played a [prominent role in deciding on the issue of consent, a matter that should be understood having regard to the entirety of the facts of the case."*

Having examined the main thrust of the appeal namely the issue of consent the learned judge allowed leave to appeal on 6 June 2019 on all grounds.

Full Bench of Court of Appeal

[15] The appeal grounds urged at the leave stage were as follows:

Acquittal

"Ground 1
The learned trial judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the assessors and in particular, by failing to take into account and properly consider, the following evidence led at trial in respect of Count 1 on the Information:

(a) *The complainant's evidence that the accused had told her to open the zip of pullover she was wearing; that she had been scared and put her hand over her chest instead; and the accused person's overt act in then taking the complainant's hand off her chest;*
(b) *The accused person's admission under cross-examination that 'mmm' (low inflection) means "no" and that he was trying to rely on the more English sounding "mmm" (drawn inflection) to support his case for consent; and*
(c) *The complainant's evidence that the accused had only asked her whether she liked what he was doing after he had touched her breast, and at no other point.*

Ground 2
The learned trial judge erred in law and in fact by relying on the complainant's non-expert opinion on the accused person's state of mind at the time of commission of the act that constituted Count 1 of the Information.

Ground 3
The learned trial judge erred in law and in fact by differing from the unanimous opinions of the assessors on the narrow issue of the accused's person's state of mind in respect of Count 1 and 2 on the Information in circumstances where the learned Trial judge and the assessors were ad idem on the facts.

Ground 4
The learned trial judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the assessors and in particular, by failing to give reasons for relying on the evidence of the accused and rejecting the evidence of the complainant on Count 22 of the Information.

Ground 5
The learned trial judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the assessors and in particular, by failing to take into account and properly consider, the complainant's evidence that she had told the accused that she was in pain; that she had cried; and that the accused had then pushed her to the ground prior to him inserting his fingers in the complainant's vagina."

[16] The Court of Appeal identified that the main thrust of the appeal is whether the trial judge had given cogent reasons in differing from the assessors' unanimous opinion of guilty. His reasons were set out in paragraphs 9-13 of his judgment. From a reading of those paragraphs, it is clear that the judge had concluded that there was no evidence that showed that the respondent knew that the complainant was not consenting or did not care whether she was consenting. That belief and conclusion could have arisen due to the evidence that the respondent had asked the complainant while he was touching her breast but before he inserted his penis into her vagina whether she liked what he was doing and because she responded "*mmm*" The trial judge also relied on the complainant's evidence that the respondent was not in a position to interpret her response "*mmm*" properly, because it was dark and he could have "*taken as she was consenting*" given her conduct.

[17] The Court also observed that the trial judge had unfortunately ignored the evidence suggesting that the respondent was planning to do what he did during the journey even before they left the complainant's father's elder brother's house at Somosomo.

[18] There is evidence in paragraph 36 of the summing up which reveals the devious execution of his plan by the respondent and how he proceeded to sexually abuse the complainant using her vulnerability which he very well knew:

> *"36. She said that night was really dark and it took them about half an hour to reach Delainaniu where the accused told her to rest for a while. Accused told her to lean against a coconut tree and keep her legs on another small tree nearby. He then told her to off the torch she was holding and she turned it off. Then the accused moved closer to her and told her to massage his shoulder. She complied. Then the accused touched her breasts and while touching he asked her whether she like what he is doing to her. She said she was scared and was anxious and therefore she only said "mmm" She said she could not say anything "because it*

was far and I was new to the place "and as there were no houses and no people nearby. He then told her to open the zip of the pullover she was wearing. She was scared and placed her hand on her chest. He accused took her hand off the chest, unzipped the pullover and licked her stomach. The accused then opened the sulu she was wearing and removed her panty. Accused licked her vagina and inserted his penis into her vagina. She said the accused had his penis inside her vagina for about 5 minutes and he did not ejaculate."

[19] Under the circumstances the Court of Appeal (per: Prematilaka ARJA) stated:

"[13] The complainant's reaction as revealed by evidence should have made the respondent realise that she was not consenting to his advances or what he was doing. Obviously, the respondent knew or at least was treckless as to the fact that she was not consenting to have sexual intercourse with him but she simply surrendered to the inevitable given the precarious and helpless situation she was in. Her already minimal physical resistance would have been dampened even further by the fact that the respondent was her father's younger brother. In the circumstances, I have no doubt that the fault element of rape had been established by the evidence."

Law on fault element in rape

[20] In **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal identified the fault elements of rape as follows:

"32. Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2). Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e., penetration to any extent) (b) lack of consent on the part of the victims and (c) recklessness on the part of the accused as defined in section 21 (1)."

"34. If recklessness is a fault element of a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4). Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three elements would be sufficient to prove the fault element of the offence of rape.

[21] With regard to the Count 2, the learned trail judge overruled the unanimous opinion of the assessors-see paragraphs 15 – 19 of his judgment. He cast doubt on the fault element of the act of digital rape committed by the respondent while accepting the proof of the physical element, that is, the penetration of the complainant's vagina by the respondent with his fingers. The Court of Appeal noted that single Judge's observation (see paragraph [14] above) on the linkage or relationship between the Petitioner and the complainant '*the likes of which the trial judge had not been mindful in overturning the assessors based on consent"*. On the Summing up the Court stated that: "notwithstanding such fair and balanced directions the assessors had still opined that the respondent was guilty of both counts showing that they were convinced beyond reasonable doubt that the prosecution had proved all elements of the two counts. In such circumstances, if the trial judge was to overturn the assessors' opinion, he carried the burden of giving cogent reasons for so doing."

[22] In **Fraser v State** AAU 128 of 2014 (05 May 2021), the Court of Appeal embarked on a detailed discussion on the duty of the trial judge when he disagrees with the assessors, and held:

> *" [24] When the trial judge disagrees with the opinion of the assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Latabui v State; Ram v State'**[2012]FJSC 32;CAV 0001,2011 (9 May 2012)**Chandra v State** [2015]FJCA 32;CAV 21.2015 (10 December 2015 ; **Baleilevuka v State**[2019]FJCA 209,AAU58,2015 (3rd October 2019) **and Singh v State [2020]**FJCA 1;CAV 0027 of 2018 (27 February 2020)."*

[23] The trial judge's reasoning in overturning the unanimous opinion of the assessors does not measure-up to the legal standard set out above; The Court stated:

> *"24……. The reasons given by the trial judge to conclude that the fault element in the two counts had not been proved by the prosecution are not founded on the weight of the evidence and not capable of withstanding critical examination in the light of the whole of the evidence."*

The Court allowed the appeal in terms of section 23(1)(b) of the Court of Appeal Act on the basis that the verdict of acquittal is unreasonable and cannot be supported having regard to the evidence and that the acquittal has caused a substantial miscarriage of justice.

Supreme Court

[24] The application for leave to appeal is made to this court (Supreme Court) on the ground: *"That Whether the learned trial judge's reasons to differ with the unanimous decision of the assessors are cogent and whether the Court of Appeal was correct in its findings that the learned trial judge's reasoning to overturn the assessor's opinion had not satisfied the cogency test.* It is absolutely necessary that the due consideration is paid to: (1) an examination and assessment of the learned Trial Judge's decision and reasons for overturning the unanimous decision of the assessors, and (2) whether the Court of Appeal was correct in its findings that the learned judge's reasoning had not satisfied the cogency test. It is necessary to refer to the submissions of the Petitioner and the State on the matter.

Petitioner's case

[25] The Petitioner, represented in this appeal by the Legal Aid Commission, had prepared a comprehensive written submission which was filed on 30 May 2023.It had also made oral submissions at the hearing but relied on its written submissions and the authorities (cases) cited therein. The crux of the submission is that the learned Appellate judges of the Court of Appeal have erred in their own assessment to convict the Petitioner, when their Lordships had not properly considered that; (i) the learned trial Judge had complied with section 237(4) and (5) of the Criminal Procedure Code when giving cogent reasons; and (ii) the learned trial judge being the final adjudicator of the facts, had entertained a reasonable doubt as to the guilt of the Petitioner which is founded on the evidences and is open on the evidence before the learned trial judge to arrive at such findings that the Petitioner is not guilty for both counts of rape. It needed to be stated from the outset on

these arguments that, it would appear that point (i) presumes or assumes to answer the very issue that is in question in this application, which is whether the learned trial Judge had given cogent reasons on why he had overturned the unanimous opinion of the assessors. On point (ii), whether it is making reference to the '*totality of the evidence'* or just '*evidences'* have different consequences in law, in my view.

[26] The Petitioner rightly pointed out that there is a plethora of authorities from this Court and the Court of Appeal in which the issue regarding cogent reasons when a trial Judge disagrees with the opinion of the assessors. The Petitioner relied on **Lautabui v State** [2009] FJSC 7; CAV 0024.2008 (6 February 2009), especially on this Court's pronouncements at paragraphs [28] to [34].I will be coming back to this case later in this judgment. However, the Petitioner, on that authority, further submitted that, the learned trial judge had found that the prosecution had not proven beyond reasonable doubt the fault element that the petitioner had known that the complainant was not consenting or that he was reckless as the whether she was consenting. Additionally, the petitioner submitted that the learned trial judge had complied with section 237(4) and (5) of the Criminal Procedure Act by providing cogent reasons in overturning the assessor's opinion as evident in the judgment of the learned trial judge. It was also the Petitioner's submission that the Petitioner *"had not known that the complainant was not consenting or that he did not care whether she was consenting as noted in paragraphs 10and 11 of the judgment for the first count of rape and paragraphs 17 and 18 of the judgment for the second count of rape is founded on the evidences. It is the Petitioner's submission that paragraphs [11] and [12] of the Court of Appeal's judgment is not supported by the evidences in its totality."*

[27] On the second aspect of the Petitioner's argument, it is argued that "It is well settled that the trial Judge is the ultimate decider of facts and law in our criminal justice system. In **Chandra v State** [2015] FJSC 32, CAV 21.2015 (10 December 2015) at [25] the following is noted;

"……The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law2 to give reasons, but he must give his reasons for disagreeing with the assessors, However, as was observed by this Court in paragraph [32] of its Judgment in Mohammed v State [2014] FJSC 2; CAV 02; CAV02.2013 (27 February 2014), " an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinion of the assessors is delivered, This should become the practice in all trials in the High Court."

[28] If that is the requirement when a trial judge '*agrees'* with the assessors opinion, how much more when the learned trial judge disagrees with the unanimous opinion of the assessors as in this case? The Petitioner prays that; *1. Leave of this Court be granted and the appeal be allowed; 2. Any other orders this Honorable Court deems fit to make*.

Respondent's Case

[29] The State through the Office of the Director of Public Prosecutions had responded to the submissions filed by the Petitioner by filing a written submission on 13 June 2023.In brief the respondent submitted that the important part of the evidence was what happened on the day, the day the Petitioner went to Somosomo on 14th January 2013.as recorded at page 319 of the High Court Record. (Quote*)"……Secondly, that the Petitioner…"* …. was in position of authority as uncle (father's brother) that she would respect and listen to him. It would be more convincing that the complainant would be waiting for him on that night since she is in control (see page 397 High Court Record). The respondent referred to paragraph 5.8 of the Petitioner's submissions and stated that even though Miriama and the other ladies farewelled them (page 398- 399) of the High Court Record), it does not take away the observations of the Court of Appeal in which the Petitioner had a readymade excuse, the fact that other people saw them did not matter since he had already informed the complainant what to say (that is to say that they were going to look for landcrabs).

[30] On the Petitioner's submission (at paragraph 5.9), that the learned trial judge was correct to arrive at the finding that the complainant indicating '*mmm'* meant to the petitioner that

she was consenting in regards to the first count of rape; the respondent submitted that, considering the complainant's evidence at page 326 of the record of the High Court, suggested otherwise: *" ... moving close to me and touching my breast, I was scared, my lord when he was touching me then he asked me did you like what I'm doing to you? My Lord I did not say anything because its far and I was new to that place, I was nervous and also scared."* It was the respondent's submission that when taking that all-in context, it confirms that the '*mmm'* was definitely the fact that she was not consenting.

[31] The respondent submitted that the Court of appeal was correct at paragraph [24] where the Court held:

> *"I am afraid that the learned trial judge's reasoning in overturning the unanimous opinion of the assessors does not measure-up to the legal standard set out above. The reasons given by the trial judge to conclude that the fault element in the two counts had not been proved by the prosecution are founded on the weight of the evidence and not capable of withstanding critical examination in the light of the whole of the evidence.*
>
> *"Therefore, the Court of Appeal in its judgment at paragraph 25 allowed the appeal in terms of section 23 (1)(b) of the Court of Appeal Act on the basis that the verdict of acquittal is unreasonable and cannot be supported having regard to the evidence and that the acquittal has caused a substantial miscarriage of justice. The acquittal should be set aside."*

[32] The respondent concluded its submission as follows: *"We submit that the Court should not grant special leave to appeal application in the present case since none of the grounds advanced in this case had a question of general importance involved, neither was there a substantial question of principle affecting the administration of justice is involved and neither is there a substantial question and grave injustice that may otherwise occur. Therefore, the present case does not meet any threshold mentioned above as per section 7(2 of the Supreme Court Act of 1988.*

Analysis

[33] The trial judge's reasons for overturning the opinion of the assessors on the first count are at paragraphs 9-13 of his judgment which are quoted in full below:

"9. *With regard to the first count the prosecution says that the accused inserted his penis without the complainant's consent. The defence says that the complainant consented and that the accused perceived that the complainant was consenting due to her responses.*

10. The complainant said in her evidence that she did not consent for what the accused did to her. However, she said that the accused asked her whether she 'like' what he is doing to her after touching her breast and she did not say anything apart from saying 'mmm' as she was scared. According to the accused he asked the complainant thrice whether she like what he is doing, before he inserted his penis into her vagina and he said that he construed the complainant's 'mmm' as the complainant giving her consent.

11. It is not disputed that the accused asked the complainant when he was touching the complainant's breast but before he inserted his penis into her vagina, whether the complainant 'like what he is doing' and the complainant responded by saying 'mmm'. Complainant herself admits in her evidence that the accused was not in a position to interpret her response 'properly, because it was dark and it was her evidence that the accused could have 'taken as she was consenting' given her conduct. There was no evidence of any circumstances which shows that the accused knew that the complainant is not consenting or he did not care whether she was consenting.

12. The complainant herself creates a reasonable doubt in my mind on whether the accused knew or believed that she was not consenting and on whether the accused was reckless as to whether she was consenting.

13. Therefore, I am not satisfied that the prosecution has proved the first count beyond reasonable doubt. Accordingly, I find the accused is not guilty of the first count."

[34] On this first count, considering the totality of the evidence adduced at the trial, I find it somewhat strange that the learned trial judge, in considering the important issue of '*consent'* in a count of the serious offence of rape chose to confine his focus only on a the pieces of evidence contained in paragraphs 9 to 13 (above) of his judgment. That he failed to consider the totality of the evidence, factors, circumstances and the environment which gives context to the act alleged to have been committed by the accused. Would these have an influence on the accused, and the complainant? Would these have an impact on the issue of consent, and whether with the totality of the evidence and the personal status and relationship of the complainant and the accused?

[35] The respondent had pointed to aspects of evidence which could have been taken into account, and the Court of Appeal had based its decision on these. Firstly, the 'important part of the evidence' according to the respondent, which is what had happened on the day the Petitioner went to Somosomo on 14th January 2023.At page 319 of the High Court Record: "*My lord, on that day my uncle came from Nawaikama to Somosomo. They came by fibre boat and when they arrived, he came home my Lord. And when they arrived my aunt Miriama told me to prepare tea for them. When I was preparing the tea he was giving signal to me for us to go together to Nawaikama."*

At page 320 of the High Court Record:

Ms Puamau: And when he say he signal to you for you to go back together that evening, what do you mean? When he said he signal to you?

Answer: He was talking and I can't hear the voice My Lord, his voice.

Ms Puamau: One further question, so how did you understand what it was he was trying to communicate to you?
Answer: My Lord, he was doing gestures.

At page 321 of the High Court Record:

Q: The hall, My Lord, At around 3pm can you tell the Court where you were?
Answer: I was at home My Lord.

Q: And what happened Madam?
Answer: And after a while he came to see me and he came again after that he came again.

Q: What did he say?
Answer: He said 9oclock to leave, My Lord.

At page 323 of the High Court Record*:*

Q: On your way out of the village, can you tell the Court what happened?
Answer: My lord, when we left, the house and he told me, if anybody ask, if anybody ask me and I should tell them that we are taking a walk to look for land crabs.

The Petitioner in his evidence at page 422 of High Court Record:

Q: *In fact as her 'Tamana lailai'; or "Ta lailai" if you put English with the Fijian word.*
Answer: *Yes my Lord.*

Q: *You were accorded more respect that even her father, aren't you?*
Answer: *yes my Lord.*

[36] In accordance with the Petitioner's evidence at page 397 of the High Court Record, he went to the complainant a few times on the night in question, first at 6pm and he told her that it is the best time for them to go and she told him for them to wait for a while when the sun goes down. At 7:30pm he went back to her. She told him if they could wait for a while and the last time, he went to her on 8:30. The Petitioner agreed that he was her *'tamana lailai'* and he would be accorded with more respect even if he was not his father. The respondent submitted, and I agree that the Petitioner was in a position of authority as uncle (father's brother). That she would respect and listen to him. That the complainant would be waiting for him on that night as he is in control.

[37] In paragraph 5.9 of the Petitioner's written submission he argued that the learned trial judge was correct to arrive at the finding that the complainant indicating '*mmm'* meant to the Petitioner that she was consenting in regards to the first count of rape. This submission is to be considered together with the complainant's evidence at page 326 of the High Court Record:

Q: *I know its difficult, could you tell the Court but what then happened?*
Answer: *My Lord, when he was touching me then he asked me did you like what I am doing to you? Judge: Yes.*

Q: *What was your response?*
Answer: *My Lord I did not say anything, that's what I said 'mmm'. That was my respond, my Lord.*

Q: *Why didn't you say anything Mam?*
Answer: *My Lord I can't say anything because its far and I was new to that place.*

Q: *Were there any houses or people nearby?*
Answer: *No My Lord.*

Q: *How did you feel about what was happening to you?*
Answer: *I was nervous my Lord and also scared.*

[38] In my assessment of the evidence, taking all the circumstances into account, the '*mmm'* construed by the learned trial judge to be consent, was in context, not consent. The learned judge's interpretation and decision on that issue does not hold under careful scrutiny given the totality of the evidence.

[39] Careful thought and consideration have been given to the judgment of the learned trial judge that is the focus of the ground of appeal in this Court, and the judgment of the Court of Appeal dated 25 June 2021as well as the Ruling of the single judge. I agree with the reasoning and Ruling of the learned single judge, and of the Court of Appeal whose judgment and decision is being challenged. Due consideration was given to the respective written and oral submissions of the Petitioner through the Legal Aid Commission, and the Office of the Director of Public Prosecutions which has greatly assisted this Court in this appeal.

[40] I am of the view that taking all relevant considerations and factors into account, the learned trial judge's reasons to differ and in overturning the unanimous opinion of the assessors does not measure - up to the standard required, and not cogent. The Court of Appeal was correct in its findings that the learned judge's reasoning to overturn the opinion of the assessor's opinion had not satisfied the cogency test. The application before this Court does not meet the requirements of Section 7(2) of the Supreme Court Act nor the threshold and standard set under cases law: **Livai Lila Matalulu and Another v Director of Public Prosecutions.**

Conclusion:

[41] For the above reasons the appeal has been disallowed. The decision of the Court of Appeal in convicting the Petitioner is affirmed.

[42] At the hearing on 25 June 2021 of the appeal by the Office of the Director of Public Prosecutions against the acquittal in the High Court of the Petitioner of two charges of rape, the Court of Appeal had allowed the appeal. It had set aside the acquittals and, in its place, entered a verdict of conviction for both counts of rape.

[43] The Court of Appeal remitted the case to the High Court for sentencing.

[44] This Court noted that after the verdict of conviction, the Petitioner was not remanded in custody pending sentencing in the High Court. As there had been a finding of guilt, the Court should have remanded the Petitioner in custody until sentencing.

[45] This Court presently has the carriage of the hearing the appeal of the Petitioner from the Judgment of the Court of Appeal.

[46] At the hearing on 14th June 2023, this Court had indicated its position and its intention in exercising its supervisory powers under section 14 of the Supreme Court Act, in subsuming the Court of Appeal jurisdiction, by ordering a remand of the Petitioner'

[47] Counsel for the Petitioner pleaded for time to make application for bail pending appeal in the court and submissions.

[48] The application for bail by Notice of Motion was filed into Court on Friday 16 June, with the necessary supporting affidavits with 2 sureties.

[49] Given the extraordinary circumstances of this case, the assurance by Counsel for the Petitioner that the Petitioner has, while remaining free outside, had obeyed and abided by all the Court Orders and directions including court appearances, and furthermore, there being no opposition by the Prosecution, this court was minded to favorably consider the Petitioner's application for bail.

[50] In the circumstances, bail was granted to the Petitioner to 29th June 2023 or as otherwise ordered by the Court, with the following conditions:

1. *That the two sureties provided are accepted the amount is set at $500.00 each, should there be a breach of any of the bail conditions.*
2. *That the Petitioner will report once weekly, every Friday between 6 – 7pm to the Nabua Police Station.*

[51] As the Petitioner's appeal has been disallowed, in the exercise of this Court's powers under section 14 of the Supreme Court Act 1998, the Petitioner who is currently on bail is remanded in custody to await sentencing at the High Court in Suva, which should take place within twenty-one (21) days.

Orders of Court:

1. *Application for leave to appeal is disallowed.*
2. *Petitioner's conviction is affirmed as per Court of Appeal judgment.*
3. *Petitioner remanded in custody to await sentencing in High Court, Suva.*
4. *Sentencing to be handed down within twenty one (21) days.*

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court

SOLICITORS:

Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecutions for the Respondent