IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0010 OF 2020
Criminal Appeal No. AAU 0003 of 2014

BETWEEN: **ABDUL RASHID**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Acting Chief Justice Salesi Temo**
Acting President 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: **Petitioner in person**

Ms E. Rice for the Respondent (ODPP)

Date of Hearing: **08 June 2023**

Date of Judgment: **29 June 2023**

JUDGMENT

Temo, AP

[1] I had the benefit of reading the draft judgment of His Lordship Mr. Justice Isikeli Mataitoga. I fully agree with his views, reasons and conclusions.

Mataitoga J

[2] This case showed the total lack of respect by the petitioner and his advisers of the court procedures and processes that governs how this Courts conduct its affairs. The Supreme Court procedures are governed by the Constitution of Fiji, the Supreme Court Act, Supreme Court Regulations and relevant case laws. In certain circumstances the Court of Appeal Act and Regulations may have a bearing on how the court operates.

[3] It is essential that when Petitioners wish to bring their complain to this Court for consideration, that they follow correct procedures in a timely, well defined and concise way to ensure that there is no misunderstanding of the grounds being urged upon the Court to review and adjudicate. In instances where, as in this case, the Court of Appeal had directed the ground for which leave to appeal has been given, that direction must be followed by the Petitioner. Failure to follow the directive that was given in the Court of Appeal will cause jurisdictional problem in the Supreme Court, which I will show shortly, after outlining relevant facts arising from the Court of Appeal.

Court of Appeal

Judge Alone

[4] The Petitioner was tried and convicted in the High Court at Suva on two counts of Rape for which he was sentenced to imprisonment for periods of 16 years and 13 years, both sentences to run concurrently with a non-parole period of 14 years imprisonment. The petitioner's out of time notice of appeal before the judge alone contained 5 grounds of appeal against the conviction and 2 grounds against the sentence. However, the judge alone, having granted the extension of time to appeal, granted leave to appeal against the conviction only for the 4th ground of appeal and refused leave to appeal against the sentence. The 4th ground of appeal read as follows;

> *"That the learned Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the Appellant at trial."*

In his ruling, the judge alone held that ground 4 "deserved to be considered for it had been sufficiently particularised and succinctly explained in the Appellant's submissions".

Full Court

[5] On 11 February 2020 this appeal was taken up for hearing before the full Court of Appeal. At this stage the petitioner informed the Court that he was now relying on three new grounds, a clear departure from the Ground 4 for which leave had already been granted. The Petitioner urged the full Court to consider his Leave application with following grounds:

> *"(i) That the learned Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the appellant at trial.*
>
> *(ii) That the learned trial Judge erred in law and fact when he failed to establish the elements of the offence of rape to find the appellant guilty as charged.*
>
> *(iii) That the Honourable Trial Judge erred in law as directions given to the assessors in paragraph 8 of the summing up do not accurately reflect the effect of alleging with a specimen count a separate much later single offence in count 2 of the indictment, (sic)".*

[6] The full court compared the new grounds to the ground for which Leave to Appeal was granted, it concluded that out of the three grounds of appeal only the Ground 1 bears some resemblance to the ground for which leave was granted by the Judge Alone. (See Ground 4 of the original ground of appeal) In the circumstances, in considering Ground 1 for its merits, it does not pose a great procedural difficulty for this Court at this stage.

[7] As regards the other two grounds, they are contextually new in nature and clearly fashioned in a way that carries no affinity to the ground for which leave had been granted by the single judge. Counsel for the appellant also conceded that fact in his submissions. The full court rejected the 2 new grounds of appeal proposed because there is no statutory provision in the Court of Appeal Act and Regulations [Cap 12] that would allow the Court receive the new grounds without following proper procedures.

[8] Unlike the High Court, the Court of Appeal does not have inherent powers to assist in this situation. When new grounds are submitted for the first time at this stage without the clearance of the hearing before the judge alone, the Court of Appeal is constrained from dealing with them because of restrictions imposed by the law.

[9] The principle laid down by the Judicial Committee of the Privy Council in the United Kingdom in **Ratnam v. Cumaraswamy** [1964] 3 All ER 933 at 935, is a sound principle to start with. It said:

> *"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion."*

[10] In relation to the new two grounds [i.e. the two that are totally new], the Court was advised of its existence, on the day of the hearing. On that day when the matter was taken up for hearing the counsel appearing for the Petitioner informed the Court he needed time to prepare arguments for it was only on a few days ago that he was retained to appear for the appellant. Having consulted the State, the Court allowed his application on the understanding that he will be arguing the appeal based on the ground for which leave had been granted by the learned judge alone.

[11] However, when the Court of Appeal convened as was agreed by both parties, on 10 May 2020, the Court received submissions on behalf of the Petitioner in which new grounds of appeal were submitted; the emergence of the new grounds after a period exceeding 4 years from the leave hearing before the judge alone. Even in the written submissions filed on behalf of the appellant, there was no explanation given why the court procedures and processes as set out in the Court of Appeal Act and Rules [Cap 12] was not followed. It was as if it did not matter. Rule 5 of the Court of Appeal Rules, made under the provisions of the Court of Appeal (Cap12) states:

> *'All applications shall not, without leave of the court, urge or to be heard in support of any grounds of objection, not stated in his or her notice of appeal...provided the court of appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground.'*

[12] This requirement was not followed and to make matters worse, no attempt was made by the counsel to obtain leave to proceed to amend the initial Notice of Appeal to

include the new grounds, which is a requirement under Rule 37 of the Court of Appeal Rules. This rule states:

> *"37. A Notice of appeal may be amended –*
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> *(a) by or with the leave of the Court of Appeal, at anytime;*
> *(b) without such leave, by supplementary notice filed with the Registrar..., not less than 14 days before opening day of the sitting of the Court of Appeal at which the appeal is listed to be heard ..."*

[13] In these circumstances when the court rules and procedures are not followed, the two new grounds were rejected outright by the court. This is the correct outcome when such disrespect is shown by petitioners and their advisers in not following court procedures.

[14] There is another likely consequence if the Court of Appeal had accepted the new grounds without following the leave procedure rules referred to paragraphs 9 – 11 above, their determination as regards the 2 new grounds would be unlawful because they are improperly before the court. The consequences of that given the requirement of section 98 (4) of the Fiji Constitution, which states that Supreme Court may grant leave to appeal from **final judgement** of the Court of Appeal. If that final judgement is defective for the reasons referred to above, the Supreme Court powers to undertake it supervisory role becomes compromised. This underscores the need for stricter determination by the court to ensure all matters coming before them for determination has satisfied all the procedures set out in the Court of Appeal Act and Supreme Court Act and the rules enacted thereunder.

[15] With the all the changes and variations in the grounds of appeal submitted before the Court of Appeal, the court decided correctly to focus on the one ground that resembles the ground of appeal for which the initial Leave Application was granted by the judge alone. This is also the stance of this Court will take, in dealing with this petition for Special Leave to Appeal.

[16] In **Fisher v State** [2016] FJCA 57; AAU132.2014 (28 April 2016), the issues of delay; and, how such delays should be addressed in dealing with an application for enlargement of time to appeal by an imprisoned convict, were considered. It was observed in that decision that:

> *"The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, those difficulties do not justify setting aside the requirements of the Act and the Rules:* ***Raitamata v The State****, CAV 2 of 2007; 25 February 2008 and* ***Sheik Mohammed v The State****, CAV 2 of 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his appeal grounds have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal.*
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> (Underlined for emphasis)

[17] Despite the clear directions by this Court in **Fisher** (supra), the Petitioner failed to submit any grounds of appeal sufficient to justify the delay, to allow the Court of Appeal to consider the special leave application. This failure is sufficient for this petition to be dismissed.

Supreme Court

[18] Before I consider the single ground of appeal for which the Court of Appeal agreed to consider and make its final judgement there is an issue I need to address. In this case in the absence of Special Leave to Appeal being granted, can [or should] the full Court of Appeal consider the new grounds of appeal urged by the petitioner, for which no leave was granted by the judge alone, nor was it submitted before him for consideration. It seems to me to allow and abuse of the court procedure to consider grounds not properly before the court must not be allowed. All petitioner's must be advised that while they may bring new grounds, in doing so there are procedures to be followed and failure to follow them may result in their proposed grounds not accepted by the court.

[19] With regard to the arguments advanced in support of the single ground of appeal that is properly before the Court, are they sufficient to meet the requirements of section 98(4) of the Fiji Constitution and section 7(2) of the Supreme Court Act Cap 12. The ground for which leave was granted in the Court of Appeal is:

> *"That the learned Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the appellant at trial."*

[20] This Court was not given any submission from the petitioner or on his behalf that addresses why this ground of appeal and the manner it was handled by the Court of Appeal would meet any of the threshold criteria set out in section 7(2) of the Supreme Court Act. Furthermore, at the hearing before this court on 8 June 2023, the petitioner informed the court that he has no additional grounds to submit and that he relies on submissions already filed for the Court of Appeal hearing.

[21] The Court of Appeal in reviewing this single ground of appeal against the trial judge's directions and the evidence and the judge alone in the Court of Appeal, stated as follow:

> *"[17] The appellant has taken a consistent position at the trial that he never had sex with the complainant. The line of cross examination of the prosecution witnesses had been compatible with his evidence in the trial that he never had sex with the complainant. Accordingly the prosecution case was a fabrication.*
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> *[18] The learned trial Judge in dealing with the two competing versions stated in the summing up as follows;*
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> > *"para [11]: Now every element in this crime is in dispute because the accused is saying that he has been falsely accused of these crimes. He says that he never had sexual intercourse with Artika let alone raped her"*
> >
> > *Again, in para [12] the learned trial Judge referring to the position taken by the appellant stated that "Because he says that he did not rape her the issue of consent is not relevant".*
>
> *[19] In the summing up from paragraphs [20] to [22] the learned trial Judge had extensively dealt with the defence evidence and directed that even if they disbelieve the evidence of the appellant, it is the duty of the prosecution to prove the case to the assessors so that they feel "sure" of the guilt of the appellant.*
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> *[20] Counsel for the appellant heavily relied on the learned Single Judge's ruling on the Ground 4 (the equivalent to ground 1 of the present appeal) in substantiating his contention. The relevant part of the learned Single Judge's ruling which is meant to be a critique of the summing up reads as follows:*
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> > *"In paragraph 13, the learned Judge appears to assume that sexual intercourse did take place and informs the assessors that*

the issue for them to consider is consent. They are not asked to determine whether, as a fact, any act of sexual intercourse took place between the Appellant and the Complainant in respect of either count 1 or count 2.There is no reference in the summing up, apart from in paragraph 11, that the assessors should consider the evidence in the context of the defence case that sexual intercourse never took place. I am satisfied that this ground raises an issue that has sufficient merit to allow the application for an extension of time

[21] In relation to the critique above, by the plain reading of paragraph [13] of the summing up, is it correct to state that the learned Judge had misdirected him-self by employing the language that he used in directing the assessors on the issue of the appellant having sexual intercourse with the complainant? What the learned Trial Judge had stated in para [13] of the summing up is as follows:

> *"The prosecution says that Artika didn't consent but she was made to submit by force and by intimidation of evil spirits which she thought were present in the room. So if you believe Artika and you think she was raped in 2005 and again on March 2011, you will find the accused guilty, but if you think that she wasn't raped in that it did happen but she was consenting then you will find him not guilty of the two offences."*

[22] Going by the language of the learned trial Judge I am unable to find anything that suggests the fact that the learned trial Judge was acting under the assumption that sexual intercourse between the appellant and the victim appeared to have taken place. When paragraph [13] is read along with the rest of the paragraphs, particularly with paragraph 11 of the summing up, I do not find any basis to believe that the learned single Judge had been correct in the criticism he was seeking to make against the summing up. To my understanding what the learned trial Judge had endeavoured to do was firstly to lay before the assessors the defence of denial of having sex with the complainant, which, if believed, would have qualified him for a complete exoneration. [See para 11]. The obverse position that is possible having regard to the evidence was that the appellant in fact did have sexual intercourse with the complainant, however if the assessors believed that it was with the consent of the complainant, that would also entitle the appellant to be exonerated from the rape charges. Having said that, the trial Judge went on to state the nature of the evidence that should be considered in convicting the appellant. The Judge was correct in saying that only if they believe the version given by the complainant about the forcible sexual intercourse that

the appellant was said to have had with the complainant they should find him guilty as charged. In my view the analysis of the evidence relating to the alleged rape incidents have been objectively carried out by the trial Judge. By inviting the assessors to examine whether the sexual intercourse took place with consent, the trial Judge had done the appellant, not a disservice but a service which is justifiable in the eye of the law.

[23] In relation to the manner in which a trial Judge should be dealing with the facts of a case, in the case of ***Silatolu v The State*** *[2006] FJCA 13; AAU0024.2003S (10 March 2006) it had been decided that:*

> *"[13] When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; R v Lawrence [1982] AC 510. It should be an orderly, objective and balanced analysis of the case; R v Fotu [1995] 3 NZLR 129".*

[22] I have quoted liberally from the discourse in the Court of Appeal to show that despite some variations in how the trial judge addressed the issue of sexual intercourse with the complainant, in the face of clear claim by the petitioner, that sexual intercourse with the victim did not take place. The judge alone made certain observations in his ruling, which was relied on by the petitioner, to bring his complain to the Supreme Court. Despite the assessment of the Court of Appeal quoted in paragraph 18, it concluded that the ground urged by the petitioner was untenable and dismissed the appeal.

Section 7 (2) Supreme Court Act [the Act]

[23] Section 7 (2) of the Act states:

> *"7 (2) In relation to a criminal matter, the Supreme Court must not grant leave to appeal unless-*
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> *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."*

[24] In **Isei Korodrau v. State** [2023] FJSC 6; CAV0022/2019(27/4/2023), the Supreme Court stated the following, which is worth repeating here about section 7(2) of the Supreme Court Act:

> *"17] The above are the threshold criteria which MUST be satisfied by the petitioner before leave may be granted. Section 7(2) requires that one or more of the criteria set out therein is made out before special leave is granted.*
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> *[18] Special leave applications act as a filtering mechanism to ensure that the Supreme Court expends its limited judicial resources determining only the most significant legal questions.*
> *[19] Section 7(2)(a) of the Supreme Court Act 2016 is directed to the court's law-making function. The grant of special leave in relation to such questions of law enables the court to clarify the law by formulating the correct legal principle. The formulation of the correct principle to clarify the law is the decisive consideration in the grant of special leave. In this way, a question of general legal importance requires this Court to be satisfied that there is a gap in its jurisprudence that requires filling. It is not sufficient that mere error be demonstrated or that a contestable point is raised. It must be established that if the error is left to stand, a state of unsatisfactory incoherence in law will exist.*
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> *[20] In the case of* ***Livia Lila Matalulu and Anor v The Director of Public Prosecutions*** *[2003] 4 LRC 712, their Lordships articulated the role of the Supreme Court in applications for special leave to appeal matters in the following way:*
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> > *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The grant of 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 from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave justice."*
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> *[22] In* ***Liberato v R*** *[1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792 (HCA) the High Court of Australia held, it not being a court of criminal appeal, will not grant special leave to appeal in criminal cases unless some point of general importance is involved which, if wrongly decided, might seriously interfere with the administration of criminal justice. It would not accord with that practice to grant special leave to appeal in a case where no question of law is involved and the court is merely asked to substitute for the view taken by an appellate court below a different view of the evidence and the summing up.*

[23] Section 7(2)(b) and (c) of the Supreme Court Act 2016 ordinarily applies to two categories of cases, one substantive, the other procedural. Both can be said to fall within the class of miscarriages of justice. Special leave may be granted in the categories to which subsections (b) and (c) applies because the judgment under challenge is inconsistent with the proper administration of justice.

*[24] It is worth mentioning here that in dealing with applications for special leave to appeal in criminal cases, the High Court of Australia first adopted the principle laid down by the Privy Council in **Re Dillet** (1887) 12 App Case 459 at 467, that special leave to appeal will not be granted unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave, injustice has been done."*

[25] In quoting in full, the Court of Appeal's assessment of the trial judges summing up and the evidence submitted in support of the ground of appeal, it is to show that the ground raises nothing extraordinary in terms of the law or the administration of justice, such that would engage the powers set out in Section 7 (2) of the Supreme Court to move this court to grant special leave to the petitioner. The ground and the supporting arguments did not raise any issue of general legal importance or substantial principle affecting the administration of justice nor was there substantial grave injustice.

[26] As was held in **Liberato v R** [supra], that it would not accord with the practice to grant special leave to appeal in a case where no question of law is involved and the court is merely asked to substitute for the view taken by an appellate court below with a different view of the evidence and the summing up. In this case, after review the proceeding in the Court of Appeal, the grounds of appeal urged for the supreme court to consider does not meet any of the three criteria mandated under section 7 (2) of the Act.

[27] In that light, the Court dismiss this application as having no merit.

Qetaki J

[28] I have considered the judgment in draft, and I agree with it and the reasoning.

ORDERS:

1. Special Leave to appeal to the Supreme Court is declined
2. The conviction and sentence against the petitioner in the High Court is affirmed.

The Hon. Acting Chief Justice Salesi Temo
Acting President 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