IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0014 of 2022
Court of Appeal No. AAU 0071 of 2016

BETWEEN: **NITENDRA PRASAD BILASH**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

Counsel: **Appellant in person**
Ms L. Latu for the Respondent

Date of Hearing: **4 April 2024**

Date of Judgment: **25 April 2024**

JUDGMENT

Temo, AP

1. I have read His Lordship Mr. Justice Brian Keith's judgment and I agree entirely with the same.

Gates, J

2. I have read in draft the following judgment of Keith J. I agree with it, and with the order to refuse leave to appeal.

Keith, J

Introduction

3. The petitioner was convicted of rape. He had pleaded not guilty. He was sentenced to 10 years' imprisonment with a non-parole period of 8 years, both terms being reduced by the 16 days during which he had been in custody following his arrest. His application for leave to appeal against his conviction was refused by the Court of Appeal. He now petitions the Supreme Court for special leave to appeal against his conviction.

The facts

4. *The background*. The events which gave rise to the prosecution took place on 22 July 2013. The petitioner, Nitendra Bilash, who I shall refer to as Nitendra in accordance with the practice in Fiji, owned a house in Vatuwaqa, which had been divided into four flats. He lived in one of the flats with his wife, his mother and his daughter. He let the other flats out. He was 40 years old at the time, and the complainant was a girl aged almost 16. On the day in question, the complainant had gone to Nitendra's flat to look after his daughter who was ten years old and who had not gone to school that day as she was ill.

5. *The prosecution's case*. The complainant's evidence was that when Nitendra came home from work his daughter took a shower, leaving her and Nitendra alone. There was no-one else in the flat: his wife was at work, and his mother was in Australia. He sat next to the complainant. She was wearing jeans at the time. Nitendra began to pull them down. She

tried to stop him, but he was able to put two fingers into her vagina. They did not go in very far. She kept on trying to push him away and was telling him not to do it. She claimed that this lasted for about five minutes before she managed to push him away. There was blood on what she called her "panty", which I assume to have been her knickers. Later on, her mother collected her. Her mother got the impression that she was worried about something, and she asked the complainant what the problem was. The complainant would not tell her, saying that she would tell her when they got home. When they got home, the complainant went to the washroom, and she then told her mother about the blood on her "panty". Her mother saw it and the complainant then told her what had happened. The two of them then went to the local police post where they reported what had happened.

6. The complainant was examined by a doctor with gynaecological and obstetrics experience on the following day just before noon. He noted that the complainant's hymen had been torn and that there was a clot of blood and redness in the area, which suggested that such injuries as could be seen had been caused within the previous 24 to 48 hours. These injuries were consistent with the complainant's account of what had happened, but they were also consistent with other possibilities, one of which was that they were self-inflicted, although that would have been very painful. In the event, it was put to the complainant that she had inflicted the injuries on herself in order to get Nitendra into trouble. She denied that.

7. The notes which the doctor made during his examination of the complainant referred to a bruise on the complainant's left breast. He had added that the complainant had been "teary" when she had recounted to him what had happened, and that she had told him that the man had kissed her breasts. The complainant had not mentioned that in the course of her evidence-in-chief. Indeed, in the course of her cross-examination, she acknowledged that she had not told the police that either.

8. *The defence case*. Nitendra worked for the Suva City Council as a clerical assistant at the time. His evidence was that he returned home from work that afternoon at about 4.30 pm. The two girls were watching television. Nothing of significance happened until the complainant's mother arrived to collect the complainant at about 5.00 pm. He claimed that at no time had he sat next to the complainant, and that at all times his daughter was with

them. She did not go for a shower until after the complainant and her mother had left. His daughter gave evidence as well. She supported her father's case. In particular, she said that she had been with the complainant the whole time her father had been with them, and that nothing untoward had happened. She confirmed that she had only gone for a shower after the complainant and her mother had left.

9. The defence also called one of Nitendra's tenants, Arun Lata, to give evidence. She said that she had got to know about the allegation which the complainant was making from the complainant's mother, who had told her about it a week or so after it was supposed to have happened when she happened to meet the complainant and her mother. The judge's note of Arun's evidence reads: "They told me if [Nitendra] is going to pay them $10,000 cash, they are going to settle it." She was not asked what the exact words had been or who had said them, but everyone seems to have accepted that the effect of Arun's evidence was that she was being told that a payment of $10,000 in cash would result in the allegation being withdrawn. Arun said that she had not told Nitendra about this at the time, as her husband had told her not to get involved. She only told Nitendra about it a week or so before the trial (which took place in May 2016, almost three years later). She claimed that she had not realised that she would have to give evidence: if she had appreciated that, she would not have told him. This allegation was not put to the complainant's mother when she gave evidence, but it was put to the complainant. She denied that it had ever happened.

10. In the interests of completeness, I should add that there were two other things which Arun mentioned in her evidence. One was that the complainant used to wear tight-fitting clothes – something which Arun plainly disapproved of. The second was that "they" used to come to her wanting to borrow money. She did not say who she was referring to – whether the complainant or her mother or both of them.

The judgment of Perera J

11. Digital rape constitutes rape in Fiji. All three assessors expressed the opinion that Nitendra was not guilty of rape. The trial judge, Perera J, took a different view. In his judgment, he

gave a variety of reasons for convicting Nitendra. First, he was impressed by the complainant. She did not try to exaggerate things, and he described the answers she gave to the questions she was asked as "honest". In particular, he did not think that her failure to tell the police that Nitendra had kissed her breasts undermined her evidence. He accepted her explanation that that she had not mentioned that to the police because she was "scared and ashamed" about it.

12. Secondly, he accepted the complainant's mother's evidence that the complainant had complained to her promptly about what she alleged Nitendra had done to her. Thirdly, he did not accept Nitendra's daughter's account of what had happened. He gave three reasons for that. The first related to an inconsistency between what she had said in examination-in-chief – namely, that when her father had arrived at the flat he had put his bag on the dining table and taken out his food – whereas when she was cross-examined, she said that she had not seen any of that as she could not see into the dining room from the living room where she was. The second related to an inconsistency between her evidence that Nitendra was still eating when the complainant's mother came to collect her, and Nitendra's evidence that he had finished eating by the time she arrived. The third related to how she gave evidence about when she took the shower. Before answering the questions she was asked about that, she had either looked around, including looking at Nitendra, or looked down, or taken some time, before confirming that she had not taken a shower before the complainant had left. The judge did not say in so many words what the significance of that was, but he presumably thought that she was either looking for reassurance from her father or was having misgivings about what she was to say.

13. Finally, Perera J dealt with Arun's evidence that she had been told that the complaint against Nitendra would be withdrawn if a suitable payment was made. He noted that the allegation had been put to the complainant though not to her mother. He made two more significant points, though. First, it had been put to the complainant by Nitendra's counsel that the proposal to withdraw the allegation if $10,000 was paid was made a few months before the trial, whereas Arun's evidence had been that it was put to her only a couple of weeks after the incident. Secondly, and much more significantly, the judge pointed out that neither the complainant nor her mother had ever told Nitendra that they would withdraw

the complaint if a suitable payment was made: at any rate, Nitendra himself had not claimed that either of them had put such a proposal to him. Would the complainant and her mother have told Arun about what they were prepared to settle for if they did not put the proposal to Nitendra?

14. The judge did not say in so many words that this had led him to reject Arun's evidence, but looking at his judgment as a whole, I am sure that he must have done. Having said that, the judge also took the view that her evidence was irrelevant. The fact that an attempt may have been made to extort money from Nitendra did not mean that the complainant's complaint against him was false. Perera J thought that Arun's evidence about the provocative clothes the complainant wore and that her family were short of money were also irrelevant: they did not make the complainant's complaint against Nitendra any the less likely. For all these reasons, he found Nitendra guilty of rape.

The subsequent progress of the case

15. Nitendra's solicitors filed an application for leave to appeal against conviction and sentence. There were 24 grounds of appeal against conviction and five grounds of appeal against sentence. The single judge refused leave to appeal. The application for leave was renewed before the Full Court, but on the day of the hearing the application was withdrawn, and the renewed application for leave to appeal against both conviction and sentence was therefore treated as dismissed. Nitendra subsequently claimed that he had been put under inappropriate pressure by the Court of Appeal to abandon his application for leave to appeal against his conviction. He applied for special leave to appeal to the Supreme Court on that basis. The Supreme Court agreed with him. It quashed the Court of Appeal's dismissal of his application for leave to appeal against his conviction, and remitted his application for leave to appeal against his conviction to the Court of Appeal to be heard by a differently constituted bench.

16. When the remitted hearing in the Court of Appeal of Nitendra's application for leave to appeal took place, Nitendra had a different legal team. His new lawyer was asked by the Court whether he was relying on all the grounds of appeal previously advanced. He told

the Court that he would be relying on all those grounds, but that since he had only been briefed the day before, he was not in a position to make fresh submissions, and he would be relying on the written submissions which had been considered by the single judge. That was not helpful because those submissions had simply repeated the grounds of appeal word for word, save for adding lengthy (and for the most part unnecessary) submissions on the test for granting leave to appeal – something which the court could have been expected to be aware of anyhow.

17. The upshot of all this is that the Court of Appeal did not have the benefit of argument from Nitendra's new legal team. All it had were the original grounds of appeal, without any submissions fleshing those grounds out. However, all the grounds were dealt with comprehensively by Dayaratne JA (with whose judgment the other members of the Court agreed). Like the single judge, the Court of Appeal regarded the application for leave to appeal against conviction as unmeritorious. It refused Nitendra leave to appeal. Unfortunately, the Court of Appeal overlooked the fact that only the application for leave to appeal against *conviction* had been remitted to the Court of Appeal by the Supreme Court. The application for leave to appeal against *sentence* had not been remitted. The Court of Appeal purported to consider the application for leave to appeal against sentence and purported to refuse it.

The current application for special leave to appeal

18. Nitendra filed a petition to the Supreme Court seeking special leave to appeal against his conviction. That petition is what the Supreme Court is now considering. His petition was drafted either by him or by someone who is not a lawyer. The same is true of amended grounds of appeal which he subsequently filed, as well as written submissions in support of the appeal. It will be necessary to consider all these grounds, but they suffer from the vices one often sees in grounds of appeal drafted by non-lawyers. They are not as crisply prepared as ones drafted by lawyers would have been, and they focus too much on establishing a particular legal principle, without then applying that principle to the facts of the case.

19. Moreover, not being a lawyer, Nitendra does not have a real appreciation of the limited role of an appellate court. For example, some of his grounds of appeal, when properly analyzed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the trial judge took was one which could not reasonably have been taken. Having said that, I turn to the current grounds of appeal. Nitendra was not represented at the hearing before us, but he disavowed any reliance on any of the 24 grounds of appeal drafted by his original legal team, and instead relied on five grounds which he had formulated himself. I deal with each in turn.

The current grounds of appeal

20. (i) *No immediate medical examination*. Nitendra's evidence was that the complainant's mother had called him on the evening of the day in question. She had accused him of molesting her daughter and had informed him that she would be making a complaint to the police about it. A little later, a police officer came to his home and took him to the local police post. It was 8.00 or 8.30 pm by then. The complainant and her mother were both there making witness statements. He asked the police officer to arrange for the complainant to be medically examined that evening, because he was concerned that the complainant might harm herself and then claim that her injuries had been caused by him. He was told that there was no doctor available at that time of night. That was why the complainant was not medically examined until the next day. Nitendra's criticism of the judge is that the judge did not direct himself about the possibility of the complainant injuring herself in the time which elapsed before she was medically examined.

21. It is true that the judge did not refer in his judgment to Nitendra's evidence that he asked the police officer to arrange for the complainant to be medically examined that evening.

However, that does not get Nitendra anywhere. In his judgment, the judge said that he had directed himself in accordance with his summing-up to the assessors, and he had reminded the assessors of that part of Nitendra's evidence. In any event, the judge was entirely alive to Nitendra's case that at some stage the complainant must have harmed herself if the injuries observed by the doctor had been as recent as the doctor had said.

22. (ii) *The demeanour of Nitendra's daughter*. Nitendra's criticism of the judge's comments about how his daughter behaved when answering questions about when she took the shower is that from where she was sitting she could not help looking at him (as well as the judge and the assessors), and that if her looking down was an indication that she was not telling the truth, the same could be said for the doctor who also looked down when he gave his evidence. Again, I cannot go along with this criticism of the judge. The doctor was giving evidence with the benefit of the notes he had made during his examination of the complainant, and necessarily had to look down when refreshing his memory from them. And the judge was in a position to tell whether Nitendra's daughter was looking at her father simply because he was in her line of sight, or whether she was seeking eye contact with him for some reason or another.

23. (iii) *The credibility of the complainant*. Nitendra's criticism of the judge is that in concluding that the complainant was a credible witness, he failed to take into account a number of factors which Nitendra claims were inconsistent with the complainant's evidence – namely that her clothes were not torn, the button on her jeans was still there, she had no injuries to, or marks on, her hands or waist which had been where she had said Nitendra had held her, and she did not call out for help from either Nitendra's daughter or the neighbours. I do not agree. It is true that the judge did not refer to any of these matters in his judgment, but the fact that the complainant's clothes were not torn and the button on her jeans was still there was in no way inconsistent with her account of what happened. Nor was the fact that her hands and waist were unmarked and uninjured. I accept that the fact that the complainant did not call for help from the neighbours was capable of being regarded as inconsistent with her evidence about what Nitendra had been doing to her, but the judge did not ignore that. He had reminded the assessors of that in his summing-up to

them, adding that the complainant's evidence was that she had not done that as the neighbours were out. And since on the complainant's evidence Nitendra's daughter was in the shower at the time, the judge would have been entitled to conclude that the complainant would have assumed that Nitendra's daughter would not have heard her.

24. There is a related point here. The judge said in para 15 of his judgment:

> *"I observed the demeanour of the complainant when she gave evidence. I did not note any attempt by her to exaggerate. In my view, she gave honest answers."*

The criticism of the judge is that he relied exclusively on the demeanour of the complainant when determining her credibility as a witness, and did not determine her credibility by looking at the evidence as a whole. That might have been a compelling point if it was accurate, but it was not. The presence of blood on her "panty" – on the assumption that her injuries were not self-inflicted – was powerful support for her case. Then there was her complaint to her mother very soon after she got home. Its effect was to negative any suggestion that she had made up her account some time later. And the judge's comment that the complainant had not attempted to exaggerate things was something which was unrelated to her demeanour but which the judge could treat as supporting her credibility.

25. (iv) <u>*Impermissible speculation*</u>. In para 26 of his judgment, the judge said:

> *"The defence counsel attempted to paint the picture that the complainant was poor, she wore short and tight fittings and she made this complaint in order to claim money from the accused. The unanimous opinion of the assessors that the accused in not guilty, shows that the defence counsel has in fact been successful in painting that picture in the minds of assessors. In my view that picture had prejudiced the assessors' minds against the complainant and the assessors failed to comprehend that those factors are not relevant in deciding whether the accused is guilty or not guilty of the offence charged."*

The criticism of the judge is that he indulged in impermissible speculation about the route by which the assessors had arrived at their opinion that Nitendra was not guilty.

26. Again, I do not agree. When a judge finds himself in disagreement with the assessors – especially when the assessors are unanimous – the judge will usually want to reassess his

own view. The judge will not know the route by which the assessors came to their conclusion. He is not permitted to ask them, and they are not permitted to tell him. So the judge's reassessment of his own view will inevitably involve him considering why the assessors reached the view which they did. In these circumstances, it was entirely permissible for Perera J to ask himself what had caused the assessors to conclude that Nitendra was not guilty. It is a little unusual for a judge to reveal in his judgment his thinking about what the assessors had in mind, but that does not make what Perera J did impermissible.

27. (v) *Absence of cogent reasons*. It is well established that where the judge disagrees with the opinion of the assessors, he must give reasons which are both cogent and in sufficient detail to withstand critical examination of them on appeal in the light of the evidence as a whole. Nitendra argues that the judge did not do that. I do not agree. The judge gave clear and comprehensive reasons for concluding that Nitendra was guilty. Whether those reasons were flawed in any material respect is another matter, but there is no doubting the route by which the judge came to his conclusion.

Nitendra's criticism of the Court of Appeal

28. There is one other matter I should mention. Nitendra claims that the Court of Appeal failed to make an independent assessment of the evidence before dismissing his appeal. That argument is flawed. It is based on a misunderstanding of what Marsoof J was saying in para 80 of the Supreme Court's judgment in *Ram v The State* [2012] FJSC 12:

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."*

What Marsoof J was saying in that passage was explained by the Supreme Court in ***Rokete v The State*** [2022] FJSC 11. At para 109, I said:

> *"Marsoof J's observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its 'supervisory' role. When the appellate court is independently assessing the evidence, it is doing so to satisfy itself, to use Marsoof J's own words, 'that the ultimate verdict is supported by the evidence and is not perverse'. In other words, the function of the Court of Appeal is to look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the accused was guilty of the charge he faced. It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused."*

29. There is another reason why the argument is flawed. In ***Lesi***, *op cit*, I said at para 74:

> *"… much of the petitioners' focus was on the judgment of the Court of Appeal. Their grounds for the most part set out the ways in which they say the Court of Appeal fell into error. That is entirely understandable. After all, they are seeking leave to appeal from the decision of the Court of Appeal. But it should not be forgotten that, although the Supreme Court is a second-tier court, its focus is still on what happened in the trial court – just like the Court of Appeal. It has the advantage, of course, of the views of the Court of Appeal on whether things went wrong in the trial court, but what it ultimately is reviewing is the course which the trial took rather than whether the Court of Appeal's analysis of the grounds of appeal was correct."*

For that reason, it is unnecessary to focus on the Court of Appeal's approach to Nitendra's appeal.

Other considerations

30. Although I do not believe that there is any substance in any of the grounds of appeal on which Nitendra relies, I have nevertheless considered – in the light of the fact that he is no longer legally represented – whether there are any other grounds for concluding that the judge's approach was flawed. Two possible arguments have occurred to me.

31. (i) *The evidential status of the complaint to the complainant's mother*. In para 32 of his judgment, Perera J said:

> *"I hold that the complainant's credibility is strengthened in view of the recent complaint she made to her mother …"*

The status of evidence of this kind is well established. It cannot be treated as corroboration of the complainant's account of what was done to her. It could only show that her account in court was consistent with what she was saying shortly after the incident. As I said earlier, it negatived any suggestion that the complainant has only recently made up the account she gave in court. Despite all that, by saying that the complainant's speedy complaint to her mother strengthened her credibility, was the judge treating it as corroborating her account, which would not have been a permissible approach?

32. I do not think that the judge fell into this error. He was an experienced judge, and would inevitably have been aware of the correct legal status of the complaint. It would have been better if he had said that the complaint showed that she had been consistent throughout, and his reference to the complaint strengthening her credibility was an unfortunate choice of expression, but I have no real doubt that it was the complainant's consistency that he had in mind. That was what Ms Latu for the State argued, and I agree with her.

33. (ii) *The relevance of Arun's evidence*. As we have seen, the judge took the view that the fact that an attempt may have been made to extort money from Nitendra by members of a family who could be inferred from their attempts to borrow money to have been poor did not necessarily mean that the complainant's complaint against him was false. That was undoubtedly correct, but that did not mean that Arun's evidence about that was irrelevant. The complainant's credibility was at the heart of the case. *If* Arun's evidence was true, it meant that the complainant had lied when she denied that any attempt to extort money from Nitendra had been contemplated. That would have been something which could have affected the judge's view of her credibility. To that extent, Arun's evidence, *if accepted*, would have been relevant to one of the crucial issues in the case, namely the complainant's credibility. The judge would have been wrong to say otherwise. However, this does not

get Nitendra anywhere because the judge must be treated as having rejected Arun's evidence. In those circumstances, the relevance of her evidence to the complainant's credibility did not arise.

Conclusion

34. In the circumstances of this case, the only basis on which Nitendra could be granted special leave to appeal against his conviction would be on the basis that a substantial and grave injustice may otherwise occur. For the reasons I have given, I do not think that there is any chance of that. I would therefore refuse Nitendra special leave to appeal against his conviction.

Order:

Special leave to appeal against conviction refused.

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

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court