IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0019 of 2023
Court of Appeal No. AAU 0044 of 2015

BETWEEN	:	**TARAJIANI BAVESI**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice William Calanchini** **Judge of the Supreme Court**
		The Hon. Justice Terence Arnold **Judge of the Supreme Court**
		The Hon. Justice Alipate Qetaki **Judge of the Supreme Court**
Counsel	:	**Petitioner in person**
	:	**Ms. M Konrote for the Respondent**
Date of Hearing	:	**04 October, 2024**
Date of Judgment	:	**29 October, 2024**

JUDGMENT

Calanchini, J

[1] I have read the draft judgment of Arnold J and agree that the appeal should be dismissed.

Arnold, J

Introduction

[2] The Petitioner, Tarajiani Bavesi, was convicted of two counts of rape of PW1 and two counts of rape of PW2, all committed on the evening of 13 May 2013. He was found to have penetrated both the vagina and the mouth of each complainant with his penis, contrary to sections 207(1) and 207(2)(a) and (c) of the Crimes Act 2009. He was sentenced to 13 years imprisonment, with a non-parole period of 12 years. The complainants were 20 and 19 respectively at the time of the offending; the petitioner was almost 39, married with two children, a serving police officer and on duty at the time.

[3] At trial, the three assessors expressed the unanimous opinion that the petitioner was "not guilty" on all counts. While accepting that the assessors' opinion was not perverse and was open to them on the evidence, the trial Judge disagreed and convicted the petitioner on all counts. His Honour said that this resulted from his analysis of the evidence and his assessment of the credibility of the witnesses.

[4] The petitioner filed a timely application for leave to appeal against conviction only. A single Judge of the Court of Appeal granted leave.[1] The principal issue was whether the trial Judge had provided sufficient reasons for disagreeing with the unanimous opinion of the assessors. Under section 237 of the Criminal Procedure Act 2009 as it then was, the trial Judge was "not bound to conform to the opinion of the assessors" but if he disagreed with the majority opinion, he had to give written reasons, pronounced in open court. According to the authorities, the trial Judge's reasons for disagreeing had to be "cogent".

[5] At the hearing before the Court of Appeal, the petitioner was represented by counsel from the Legal Aid Commission. After considering a range of relevant authorities, the Court dismissed the petitioner's appeal and confirmed his convictions.[2] The petitioner now seeks leave to appeal to this Court from that decision.

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1 *Bavesi v State* [2017] FJCA 68.
2 *Bavesi v State* [2022] FJCA 2.

Jurisdiction

[6] As is well known, under section 7(2) of the Supreme Court Act 1998, this Court must not grant leave to appeal in a criminal matter unless the appeal involves at least one of (i) a question of general legal importance, (ii) a substantial question of principle affecting the administration of criminal justice, or (iii) the risk that a substantial and grave injustice may otherwise occur.

[7] I would grant leave to appeal in the present case. In my view, the proposed appeal raises an arguable issue concerning the adequacy of the trial Judge's reasons for disagreeing with the unanimous view of the assessors. Accordingly, the first and third of the criteria are met.

Factual background

[8] A man, Waisea, complained to police that someone had stolen his mobile phone. He suspected his two cousins, PW1 and PW2, with whom he lived at their grandmother's house. The petitioner was ultimately assigned to deal with the matter and told to go to the grandmother's house to make inquiries. The petitioner went to the grandmother's home around 6 pm and asked PW1, PW2 and Waisea to go with him to the police station to sort the matter out. PW1, PW2, Waisea and another cousin left with the petitioner to go to the police station.

[9] There was a short cut through a cemetery that locals frequently used, so the group took that route. Part way into the cemetery the petitioner said that he wished to stop and question PW1 about the missing phone. He told the other three to keep going to the police station and wait for him there.

[10] According to the prosecution, when the others had walked on, the petitioner told PW1 to sit down in a kiosk. He asked her whether she was in a relationship. PW1 refused to discuss that, and the pair left the kiosk and walked a little further, at which point the petitioner forced PW1 to sit down on a grave. There he forcibly removed PW1's clothing and inserted his penis first into her vagina and then into her mouth. PW1 said that she tried to shout and escape his grip, but he covered her mouth with his hand. He

told her not to tell anyone about what had happened. PW1 said she was scared of the petitioner. She said she then ran off towards the police station, where she met up with PW2 and the others. The petitioner arrived shortly after. PW1 said she was too scared to say anything about what had happened to her.

[11] In his evidence, the petitioner said that he had asked PW1 to stop and talk to him because Waisea had indicated that his phone had been returned and he wanted to "close the case". He said when he sat down on a grave to tie up his bootlace, PW1 had asked him not to tell anyone at home about her involvement with the missing phone and had begun hugging and kissing him and touching his penis. He said PW1 had seduced him. He accepted that his penis had touched PW1's vagina but denied that penetration had occurred. In any event, he said that their sexual activity was consensual. He denied that any oral sex had occurred.

[12] PW2's account was that having been told by the petitioner to walk on to the police station while he questioned PW1 about the missing phone, she and the others went to the police station and waited on a veranda there for about 30 minutes. At that point, PW1 arrived, followed by the petitioner. PW1 was withdrawn and did not converse with anyone. The petitioner told PW2 that PW1 had admitted stealing the phone and they needed to go back to their home to find it. He and PW2 headed back to the house through the shortcut while the others remained at the police station.

[13] PW2's evidence was that while walking back through the cemetery, the petitioner directed her to take a particular path. At some point the petitioner stopped and said to PW2 that the issue about the phone could be solved between them but if it was not, she and PW1 would be arrested. PW2 said she sat on a grave while the petitioner was talking. He pushed her back onto the grave, lay on top of her, removed her shorts and his pants and had sexual intercourse with her, both through the vagina and mouth. She said she did not consent to this and attempted to push the petitioner away but could not as he was tall and strong. She did not shout out as it was dark and she could not see anybody. She and the petitioner then went to her grandmother's house, where she retrieved the phone and returned to the police station with the petitioner, where the petitioner gave it to Waisea.

[14] The petitioner did not deny that sexual intercourse had occurred. Again, he said it was consensual and that PW2 had instigated it. He described his alleged seduction by PW2 in remarkably similar terms to his description of his alleged seduction by PW1.

[15] The allegations made by PW1 and PW2 came to light when a cousin of PW1 and several other relatives went to the police station to find them around 8 pm that evening. They found PW1 and PW2 and took them home. PW1 was crying and PW2 looked shocked. PW1 ultimately said that the petitioner had done something to her. PW2 said that he had done something to her as well. At that point, the cousin took PW1 and PW2 to another police station, where they were interviewed and made statements. They also underwent medical examinations at 11 pm the same evening. In relation to PW1, the doctor recorded that she had "blunt affect". His examination found evidence of recent forceful sexual intercourse. In relation to PW2, there was no evidence of forceful sexual intercourse but evidence of menstrual bleeding. Overall, the medical evidence was inconclusive on the crucial issue of the presence or absence of consent.

Basis for petition

[16] The petitioner's application to the Court seeks leave to appeal his conviction on three grounds:

(a) The trial Judge erred when he disagreed with the assessors' opinion of "not guilty" on all four counts without giving a cogent reason, especially given that he found that the assessors' opinion was not perverse and was open to them on the evidence.

(b) The trial Judge erred in that he took into account that the petitioner had behaved in a manner that fell below the standard required of a police officer when finding that the petitioner was not a credible witness.

(c) The trial Judge erred when found the petitioner guilty in relation to counts 3 and 4 involving PW2 on the basis that he was in police uniform and had abused his position of authority.

[17] The petitioner's written submissions to the Court range more widely and include submissions on sentence, which was not the subject of the appeal to the Court of Appeal. I will confine myself to addressing the issues raised in the petitioner's application in respect of his conviction. As the three issues are interrelated, I will address them together.

Analysis

[18] The essence of the petitioner's argument is that the trial Judge did not give "cogent reasons" for taking a different view from the assessors. He contends that the trial Judge was influenced by irrelevant considerations, namely that his actions as a uniformed and "on duty" police officer were inappropriate and that he had abused his position of authority.

(i) The Law

[19] I begin with the law. As I noted earlier, the trial Judge was entitled under s 237 of the Criminal Procedure Act 2009 (as it was at the time) to disagree with the unanimous opinion of the assessors. He was entitled to disagree even if he considered that their opinion was not perverse and was open to them on the evidence. The reason for this is that the assessors' opinions were given simply to assist the Judge – it was the trial Judge who was the decision-maker.

[20] That said, this Court has previously stated that the Judge's power to disagree with the opinion of the assessors is subject to three important qualifications.[3]

(a) The first is that the trial Judge "must pay careful attention to the opinion of the assessors and must have 'cogent reasons' for differing from their opinion". Those reasons must be "founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses."[4]

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3 See *Lautabui v State* [2009] FJSC 7.

4 *Lautabui* at para [29] (references omitted).

(b) The second is that the judge must pronounce his or her reasons for differing from the majority (in this case, unanimous) opinion of the assessors in open court, as required by s 237(4). Failure to do this, whether because no reasons were given or because the reasons given were inadequate, will be sufficient to justify the setting aside of a conviction.[5]

(c) The third is that, where there is an appeal against conviction, especially on a question of fact, the trial judge's reasoning will necessarily be scrutinised by the appellate court; accordingly, the reasoning must expose the process by which the judge has reached his or her conclusion as to the facts. As this Court said:[6]

> In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused has given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.

[21] As I see it, the statutory scheme, and the relevant judicial authorities, reflect the high value that free and democratic societies place on transparency in the operation of criminal justice processes. Where a trial judge sat with assessors, the judge was obliged to undertake an independent evaluation of the evidence to determine whether he or she agreed or disagreed with the assessors' opinion.[7] Under section 237, where a trial judge agreed with the opinion of the assessors, he or she did not have to give a reasoned judgment; as far as the section was concerned, it was sufficient that the reasons could be found in the summing up. Nevertheless, this Court noted in several cases that appellate courts would be greatly assisted if when a judge agreed with the assessors' opinion, he or she delivered a written judgment setting out the reasons and recommended this as best practice.[8]

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5 *Lautabui* at para [30].
6 *Lautabui* at para [34].
7 See, *Ram v State*, [2012] FJSC 12, at para [80] per Marsoof JA.
8 See, for example, *Sheik Mohammed v State* [2013] FJSC 2 at [32] per Calanchini JA.

[22] Where a judge disagreed with the assessors' opinion, however, it was a legal requirement rather than simply a matter of best practice that the judge state the reasons for disagreement. In this context, transparency of reasoning performs a number of important functions:

(a) First, the requirement to give reasons is a fundamental characteristic of judicial decision-making. It provides an important discipline for judges and helps to ensure rational rather than arbitrary decision-making. It was particularly important where lay people acted as assessors in a criminal trial. Their role was to assist the trial judge. The fact that they were drawn from different walks of life and had a variety of life experiences meant that they might well bring to bear a perspective different from that of a professional judge. The judge was entitled to reject their opinion, but the requirement to give cogent reasons, and to do so in writing in open court, reflected the importance accorded to the assessors' role. At the very least, it was a mark of respect for their opinion.

(b) Second, the provision of reasons is critical to enable an accused, his or her supporters, witnesses and the public generally to understand why the judge reached the particular decision that he or she has, especially where it differs from that of the assessors. Without reasons, the accused and other interested persons would be left to speculate, and that has the potential to be corrosive of the public confidence on which the effective functioning of the criminal justice system depends.

(c) Third, the effective operation of the appellate process requires that trial judges give reasons for their decisions so that the appellate court can evaluate them. Without stated reasons, appellate judges may be unable to discern precisely why a trial judge has made a particular decision. Speculation as to reasons is, of course, unsatisfactory.

[23] I now turn to the Judge's reasoning in the present case.

(ii) The Judge's reasoning

[24] The trial Judge gave written judgment stating his reasons for differing with the assessors and it was pronounced in open court. The question is whether the reasons given were adequate.

[25] I note that under section 237(5), the Judge's summing up and the decision of the court "together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for all purposes…". Counsel for the State, Ms Konrote, drew attention to this provision and argued that the Judge's reasoning for disagreeing with the assessors could be discerned from the combination of his summing up to the assessors and his judgment. I will return to this aspect at paragraph [43] below.

[26] The trial Judge's judgment is relatively brief. After setting out his power to reach a different view from that of the assessors, he gave his reasons for disagreeing. The Judge said that his disagreement resulted from his analysis of the evidence and his assessment of the credibility of the witnesses.

[27] The Judge dealt first with counts 1 and 2 relating to PW1. In relation to count 1, he began by giving a brief summary to the effect that PW1 and PW2 were under suspicion for theft of the mobile phone and were on their way to the police station when the petitioner sent PW2 and the others on ahead. The Judge went on to say:

> 6 … The accused was in police uniform, a symbol of authority. While at the grave the accused proceeded to have sexual intercourse with [PW1]. He admitted in his evidence that his penis was touching PW1's vagina. He denied penetrating PW1's vagina at the time. PW1 said, he penetrated her vagina with his penis, at the time. On this issue I prefer to accept PW1's evidence, because she was a credible witness to me. I reject the accused's denial on this issue, because he is not a credible witness. For a start, it is not proper for a police officer to attempt to have sexual intercourse with a person he's investigating, in the course of his duty. The accused's behaviour in this case falls below the standard required of a police officer.

The notable feature of this passage, to which I return below, is that the Judge gives the impropriety of the officer's conduct as the reason for concluding that he was not a credible witness on the issue of penetration.

[28] The Judge next addressed count 2, as follows:

> 7 On count no. 2, PW1 said, the accused inserted his penis into her mouth, at the time, after having sex with her. The accused denied this. On count no. 2, I accept PW1's evidence as credible, and I accept her evidence that the accused unlawfully inserted his penis into her mouth on 13 May 2013, without her consent, and he knew she was not consenting, at the time. I reject the accused's denial, because I find his evidence not credible.

[29] The Judge then turned to counts 3 and 4 relating to PW2. He said:

> 8 On count no. 3 and 4, I accept the evidence of the second complainant [PW2] as credible. In my view, the accused, while in police uniform, abused his position of authority, by forcing himself on PW2. PW2 was being investigated by the accused for alleged mobile phone theft. He should not have sex with PW2. In my view, he forced himself on PW2, inserted his penis into her vagina without her consent, and he knew very well she was not consenting to the same, at the time. I accept PW2's evidence that he inserted his penis into her mouth, without her consent, and he knew very well she was not consenting to the same, at the time.

[30] Finally, the Judge summed up the position as follows:

> 9 On the whole, I accept the evidence of PW1 and PW2 on the four counts of rape against the accused, because I find their evidence credible. I reject the accused's assertion that the two complainants consented to sexual intercourse with him at the material time [counts no. 1 and 3]. I find, as a matter of fact, that the accused forced himself on them, and abused his authority as a policeman. I also reject his assertion that PW2 willingly sucked his penis [count no. 4]. In my view, he forced himself on her, without her consent, and knew she was not consenting to the same, at the time. As for count no. 2, I accept PW1's evidence that the accused forcefully inserted his penis into her mouth, without her consent, and he knew she was not consenting, at the time.

(iii) Were the Judge's reasons sufficient?

[31] At paragraph [20](c) above, I have quoted a passage from this Court's judgment in *Lautabui*, setting out a trial judge's obligations in a case where the accused has given evidence. To recapitulate, the Court said that the Judge must explain why he has

rejected the accused's evidence on critical factual issues. "The explanation must record findings on critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events." The Court acknowledged that the analysis need not be elaborate and may in some cases be short. But the key elements in the evidence that led the judge to conclude that the prosecution had established its case beyond a reasonable doubt must be identified.

[32] In the present case, the assessors considered that the prosecution had not established its case beyond a reasonable doubt; the trial Judge considered that it had. The main reason for this was that the trial Judge believed the evidence of PW1 and PW2 and disbelieved the contrary evidence of the petitioner. In a "she said/he said" or "word against word" case such as the present, where the outcome depends critically on whether the complainant's evidence is believed, it may not always be possible for a trial judge to explain in detail why the complainant's account has been accepted and the competing account of an accused rejected. The extent of the explanation that can be given will depend on the nature of the evidence and circumstances of the particular case.

[33] There are, in my view, two features of the trial Judge's explanation in the present case which require further examination.

[34] First, in relation to count 1 (vaginal intercourse with PW1) there were two matters in dispute on the evidence – had the petitioner penetrated PW1's vagina and did PW1 consent to sexual intercourse with the petitioner. In relation to the first matter, PW1's evidence was that the petitioner had penetrated her; the petitioner's evidence was that he had not – his penis had merely touched PW1's vagina. The trial Judge accepted PW1's account. He said that he considered PW1 to be a credible witness but did not believe the petitioner was credible. The Judge explained this conclusion by saying that it was not proper for a police officer to attempt to have sexual intercourse with a person he was investigating in the course of his duty; the petitioner's behaviour fell below the standard required of a police officer.

[35] The Judge did not mention in paragraph [6] of his judgment the second matter in dispute, ie, whether or not there was consent, and so gave no explanation of why he

accepted PW1's evidence that there was no consent and rejected the petitioner's evidence that there was. But it is clear from the judgment as a whole that the Judge accepted PW1's account and rejected that of the petitioner because of his views as to the credibility of each.

[36] The trial Judge made similar comments about the impropriety of the petitioner's conduct when setting out his reasoning on counts 3 and 4 in relation to PW2. The Judge said that he considered that the petitioner abused his position of authority when, while in uniform, he forced himself upon PW2. The Judge said that the petitioner was investigating PW2 for mobile phone theft and should not have had sex with her. He accepted PW2's evidence and rejected the petitioner's evidence.

[37] While it is undoubtedly true that, even on his own account, the petitioner's conduct fell far short of the type of conduct expected from on-duty police officers, the impropriety of his conduct was not relevant to the petitioner's credibility in relation to the particular allegations against him. The petitioner accepted that he had engaged in sexual activity with PW1 and PW2. The principal issue was whether it had been consensual or non-consensual.

[38] The fact that an accused in a rape case was a serving police officer at the relevant time can be relevant to the question of the consent. Consent must be freely and voluntarily given: section 206(1) of the Crimes Act 2009. Under section 206(2), consent is not freely and voluntarily given where it is obtained by, among other things, exercise of authority. For example, PW2's evidence was that the petitioner had said to her that if the issue about the phone could not be resolved between them, she and PW1 would be arrested. If in the face of that, PW2 had agreed to have sexual intercourse with the petitioner, there would be a strong argument that her consent was not freely and voluntarily given because it resulted from the exercise of authority and was, therefore, no consent at all. The trial Judge did put questions to the petitioner while he was under cross-examination which appear to have been directed at this possibility.

[39] However, that was not what the prosecution alleged occurred in this case. Here, the prosecution case was that neither PW1 nor PW2 agreed to have sexual intercourse with

the petitioner, whether through exercise of authority or otherwise - they simply did not consent. And this was the basis on which the trial Judge summed up to the assessors. Accordingly, I do not see the propriety of the petitioner's conduct as being a reason for concluding that he was not a credible witness in relation to the matters at issue.

[40] This brings me to the second point. The trial Judge found PW1 and PW2 to be credible witnesses but considered that the petitioner was not credible. Apart from referring to the impropriety of the petitioner's actions, the Judge did not explain why he reached this conclusion. As I have said, it will not always be easy in a "she said/he said" case for a judge to explain why one person is believed and the other is not.

[41] Yet generally, there will be legitimate reasons for believing one witness over another, reasons that can be explained in a rational way. I give four examples:

(a) A witness's account may be inherently implausible. In the present case, it may legitimately be asked whether it is likely that two young women would, independently of one another but in a remarkably similar way, seduce an older police officer, previously unknown to them, in a cemetery in the early evening as he was conducting inquiries into the disappearance of their cousin's mobile phone.

(b) There may be admissible contextual evidence that supports a witness's account, for example evidence about their physical or mental state at or around the time of the events at issue. Here, for example, there was evidence from several sources of PW1's state – crying, withdrawn, blunt affect and so on. Similarly, in relation to PW2, who witnesses said looked "shocked".

(c) There may be features of a witness's account that require explanation and, if not satisfactorily explained, provide a basis for drawing adverse inferences. For example, in the present case, the petitioner required PW1 to stop partway through the cemetery while the others went ahead to the police station. His explanation for this was that he wanted to question PW1 about the missing mobile phone, although his evidence was that he had by this time been told that it had been found. Given all the circumstances, the petitioner's explanation lacks credibility.

It is incredible that a police officer would attempt to conduct an interview about a missing phone with a suspect in the middle of a cemetery at 6 pm in the evening rather than completing the short journey to the police station and conducting the interview there. PW1's account gives a much more likely explanation of the reason for the diversion.

(d) A witness's account may be supported by other evidence, such as objective evidence (eg, texts) or other uncontroverted evidence. In the present case, several hours after their interactions with the petitioner, PW1 and PW2 subjected themselves to intimate physical examinations by a male police doctor previously unknown to them. Agreeing to undergo such a physical examination is much more consistent with their account of what happened than with the petitioner's account.

[42] However, points such as these were not made in the trial Judge's judgment. Overall, I consider that the reasoning in the judgment does not meet the "cogent reasons" requirement. Generally speaking, it contains conclusions rather than reasons, and to the extent that it contains reasons, they relate to the impropriety of the petitioner's actions as a serving police officer and are irrelevant to the critical issues. The question now is: what follows from this?

(iv) Consequences of insufficiency of reasons

[43] As previously noted, Ms Konrote drew attention to section 237(5), which provided that "the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for all purposes". She submitted that when the summing up and the judgment were considered together, the trial Judge provided sufficient cogent reasons as to the basis of his disagreement with the assessors.

[44] The Court of Appeal adopted the same approach. As Gamalath JA explained:

> … in my opinion, there is a need to take a holistic view of the entirety of the attendant circumstances as exudes from the totality of the evidence

> coupled with the directions in in the summing up and the reasons given in the judgment. Unless there is a manifest miscarriage of justice surfacing from the final determination of the trial judge's exercise of powers vested in him by law, no higher forum should interfere with the final outcome of a trial. Any decision on the cogency of the reasons as adduced by the trial judge should be assessed by evaluating the reasons in the backdrop of the matrix of evidence in particular.

[45] I do not agree that, when considering the cogency of a trial judge's reasons for disagreeing with the assessors' opinion, an appellate court may look beyond the trial judge's judgment to the evidence and the summing up to see whether sufficient reasons emerge from those. I do not accept that section 234(5) envisaged that.

[46] Section 234(4) provided that when a trial judge did not agree with the majority opinion of the assessors, he or she had to give reasons for differing with the majority opinion, which had to be in writing and pronounced in open court. Those reasons then became one element of the judgment of the court "for all purposes". In my view, the phrase "for all purposes" did not include the purpose of considering whether the trial Judge's reasons for disagreeing with the assessors were "cogent". The words in section 237(5) "together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors" indicate that there must be a separate decision containing reasons to fulfil that requirement.

[47] However, because I consider that the proviso to section 23(1) of the Court of Appeal Act 1949 can be applied in a case such as the present, the evidence, the summing up and the decision of the trial judge can properly be considered in that context, as I now explain.

(v) Application of the proviso

[48] In paragraph [20](b) above, I noted that the Supreme Court in *Lautabui* had said that non-compliance with the requirement for reasons, whether because no reasons were given or because the reasons given were inadequate, would be sufficient to justify the setting aside of a conviction. The Court said that it was "common ground" that the

convictions in that case should be quashed, and the matter remitted to the High Court for a new trial.[9]

[49] I do not consider that the Court was intending to lay down a blanket rule, to the effect that the automatic result where the reasons for non-acceptance of the assessors' majority opinion were not cogent was that an appeal must be allowed and the conviction quashed. Rather, the Court was addressing the particular circumstances of that case. Put another way, the Court did not intend to hold that the proviso to section 23 of the Court of Appeal Act could never be applied where inadequate reasons were given for disagreement.

[50] Under the proviso to section 23, even though the Court of Appeal considers that a point raised in an appeal against a conviction might be decided in favour of the appellant, it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. Under section 14 of the Supreme Court Act 1998, this Court has the powers of the Court of Appeal in relation to matters that become before it, which includes in a criminal case the power to apply the proviso. I would apply the proviso in the present case.

[51] While I acknowledge that the trial Judge considered that the assessors' opinion in the case was not perverse and was open to them on the evidence, having examined the record carefully, I consider that there is no doubt on the evidence that the petitioner committed the offences with which he was charged. I note that the trial Judge is a very experienced criminal trial Judge, well used to assessing evidence. Having reviewed the trial record, I agree with him that the State established the petitioner's guilt beyond reasonable doubt. I have referred to a number of relevant factors at paragraph [41] above. To those I add that PW1 and PW2 were cross-examined closely about their accounts but did not waver. It would be an extraordinary coincidence if two young women were independently to act in the way alleged by the petitioner, so extraordinary as to be incredible.

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9 *Lautabui*, above 3, at [49].

[52] Accordingly, I would:

(a) Grant the petitioner's application for leave to appeal;

(b) Dismiss the appeal and affirm his convictions, on the basis of the proviso.

Qetaki, J

[53] I have read and considered the judgment (in draft) of Arnold, J and I entirely agree with it, the reasoning and the orders.

Orders of the Court

1. *The application for leave to appeal against conviction is granted.*
2. *The appeal is dismissed.*
3. *The Petitioner's convictions are affirmed.*

The Hon. Justice William Calanchini
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court