IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU 06 of 2014
(High Court Criminal Case No. HAC 96 of 2011)

BETWEEN	:	**PRANEET ANAND REDDY**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Calanchini, P** **Prematilaka, JA** **Fernando, JA**
Counsel	:	**Mr. Waqainabete. S for the Appellant** **Mr. Vodokisolomone. S for the Respondent**
Date of Hearing	:	**16 February 2018**
Date of Judgment	:	**08 March 2018**

JUDGMENT

Calanchini, P

[1] I have had the opportunity to read in draft form the judgment of Prematilaka JA and agree that the appeal against conviction should be dismissed. I also agree with his conclusions in respect of grounds 2 and 3 of the grounds of appeal upon whom the Appellant relied at the hearing of the appeal. However I venture to add some further comments that relate to ground 1 of the Appellant's grounds.

[2] The background facts have been conveniently summarized by Prematilaka JA in his judgment and I rely on that summary. The three grounds of appeal also have been set out in full by Prematilaka JA in his judgment. Briefly, ground 1 challenges the directions given to the assessors by the learned trial Judge on the statutory defence to defilement. Ground 2 challenges the directions given on issues of proof. Ground 3 challenges the use of the expression *"fanciful doubt"* by the trial Judge during the course of his directions to the assessors.

[3] As indicated my comments are restricted to ground 1 concerning the directions given on the defence to defilement. The offence of defilement under section 215(1) of the Crimes Act 2009 involves a person unlawfully and carnally knowing or attempting to have unlawful carnal knowledge of another person who is or above the age of 13 and under the age of 16. If convicted the accused is guilty of a summary offence for which a sentence of imprisonment of up to 10 years may be imposed. Under section 215(2) of the Act it is a sufficient defence to the charge of defilement if it is made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe that the other person was of or above the age of 16. Furthermore section 215 (3) provides that it is not a defence to a charge of defilement that the other person consented to the act.

[4] It would appear then that in the ordinary course of events the defences available to an accused charged with defilement would include (a) that he was not the person who committed the act as he was not present at the time, or (b) that he was present but that sexual intercourse never took place or (c) that he had reasonable cause to believe and did in fact believe that the other person was of or above the age of 16 years.

[5] At the trial in the court below the appellant was found not guilty of rape but guilty of defilement. It would appear that the assessors and the trial judge had been satisfied beyond reasonable that sexual intercourse had taken place but concluded that there was a reasonable doubt as to whether it had taken place without the consent of the complainant. That explains the acquittal in relation to rape and the guilty verdict in respect of the defilement charge.

[6] The defence relied upon by the Appellant at the trial was that no act of sexual intercourse took place between him and the complainant at the place and on the date alleged by the complainant. It is apparent from the appeal record that neither consent (in respect of the rape charge) nor age (in respect of the defilement charge) were raised by the Appellant. It was not disputed that he was present in his quarters when the complainant and her friend visited the Appellant. However he maintained that sexual intercourse did not take place. At page 201 of the record, after counsel for the Appellant had cross-examined the complainant on a number of issues, State Counsel, before commencing re-examination and with the assessors out of court, was compelled to ask *"what is his defence. No sex? Or consent?"* The reply on the next line appears as *"no sexual intercourse"*. The Appellant's evidence in chief on pages 218 and 219 of the record is clear in the assertion that no sexual intercourse or sexual contact took place when the complainant visited his quarters on the night in question. There is no reference in his evidence to the issue of consent or to the issue of the complainant's age. In cross-examination at page 217 the Appellant denies that sexual intercourse took place when the prosecution case was put to him. The Appellant was represented by Counsel at the trial.

[7] In my view once the Appellant had indicated that his defence was that no act of sexual intercourse took place, then the issue of age which is the basis of the statutory defence, is irrelevant. Questions by Counsel relating to age should not have been allowed. The obligation of the trial judge to consider whether to give directions on defences rests on there being some evidence adduced during the trial that warrants consideration of that defence by him and whether to give directions. In this case there was no evidence that related to what the Appellant believed to be the age of the complainant nor was there any evidence as to the appearance of the complainant at the time of the alleged sexual intercourse. There was no challenge to the age of the complainant and the defence was not raised by any evidence given by the Appellant.

[8] Under those circumstances it was not necessary for the trial judge to raise the defence in his summing up let alone give detailed directions as to whether the defence was available on the evidence. In fact in the absence of the defence being raised by the

appellant in the form of some evidence that satisfied the evidentiary burden it is difficult to understand how the Judge could give meaningful directions.

[9] In my judgment it is unnecessary to consider ground 1 which seeks to challenge the learned trial judge's directions or the lack thereof on the statutory defence when it was not raised in evidence nor relied upon by the Appellant. For that reason I conclude that there is no merit to ground 1.

Prematilaka, JA

[10] This appeal arises from the conviction of the Appellant on the alternative count of defilement under section 215 (1) of the Crimes Decree, 2009 (now the Crimes Act, 2009) where the Amended Information had also alleged an offence of rape under section 207 (1) and (2) (a) of the Crimes Decree said to have been committed on 13 March 2011 at GAU island in the Eastern Division, against the Appellant.

[11] The Amended Information dated 15 January 2014 describes the particulars of the first count as the Appellant having had carnal knowledge of P (name withheld) without her consent and those of the alternative count as the Appellant having had carnal knowledge of P who was between the age of 13 to 16.

[12] After trial the assessors expressed unanimous opinions that the Appellant was not guilty of rape but guilty of defilement. The Learned High Court Judge on 30 January 2014 concurred with their opinions in his Judgment and convicted the Appellant. On 04 February 2014 the Learned Judge imposed a sentence of 02 years of imprisonment with 18 months as the minimum serving period of the sentence before the Appellant becomes eligible for parole.

Preliminary observations

[13] The Appellant had sought leave to appeal against the conviction on six grounds of appeal upon his amended application for leave to appeal dated 26 June 2014 and the single Judge of the Court of Appeal had allowed leave to appeal in respect of 02

grounds of appeal on 13 March 2015. However, the Legal Aid Commission had on 24 September 2015 submitted an Amended Grounds of Appeal consisting of three grounds including the two grounds on which leave to appeal had been granted and a fresh ground of appeal. Written submissions on behalf the Appellant had been filed on the same day and the Respondent also had tendered written submissions on the said three grounds on 09 January 2018. The fresh ground of appeal had been included presumably in terms of Rule 37(1)(b) of the Court of Appeal Rules.

Grounds of Appeal

[14] Therefore, the grounds of appeal that would be considered by this Court are as follows.

Ground 1

'The Learned Trial Judge erred in law and in fact when he misdirected and/or failed to provide any assistance to the Assessors about the defence to defilement.'

Ground 2

'The Learned Trial Judge erred in law and in fact when he invited the Assessors to decide the guilt or otherwise of the Appellant solely on the prosecution evidence.'

Ground 3

'The Learned Trial Judge erred in law and in fact when he misdirected the assessors using the phrase "fanciful doubt" resulting in substantial miscarriage of justice.'

Summery of evidence

[15] The Appellant had been appointed as a Secondary School teacher on the island of Gau in February 2011 in Form 5 where the complainant had been a student. The Appellant had been 22 years old at the time and the complainant had been 15 years. The Appellant had taught her Maths and Physics prior to the incident. The Appellant had resided in the school staff quarters located less than 200 meters away from the girls' dormitory together with another male teacher called Kumar. On 13 March 2011 which was a Sunday at around 7 p.m., the complainant together with another student called Sovaia Nawaca, who was called as a prosecution witness, had gone to the Appellant's quarters to get some noodles, though not allowed, as the students were supposed to be in their dormitories at that time. Nevertheless, the Appellant had allowed both the complainant and her friend into his quarters and taken the complainant inside his room while Sovaia waited outside the room with the other male teacher. The Appellant and the complainant had spent 5 to 10 minutes inside the room where they had allegedly been engaged in sexual intercourse, with the Appellant using a condom. Thereafter, the complainant and her friend had returned to the dormitory where the complainant relayed the incident to her friend. The 'love-bite' marks on her neck had raised suspicion with the school authorities and the complainant had been interviewed by the Vice Principal, counselled and then suspended. Following the incident the Appellant too had been suspended. The matter had then been reported to the Police at Qarani, Gau.

[16] According to the Complainant, the Appellant had first bitten her neck and then made two or three attempts to insert his penis inside her and finally did so halfway but not inside the vagina. He had used a condom and after five to ten minutes she had felt the Appellant ejaculating and then, wetness between her thighs. On being questioned of the love bites on the following day, she had *inter alia* told the vice principal that she had consented to have sex. Sovaia had confirmed their encounter with the Appellant at his quarters and the fact that the Appellant had taken the Complainant inside his room. After they returned to the dormitory, the Complainant had shown the red bite marks on her neck to her and said that the Appellant had forced her to have sex. The Complainant had been medically examined on 08 April 2011 and the doctor had seen

fading bruises on her neck which could be possible love bites and were three weeks old. Vaginal examination had revealed that the Complainant's hymen had not been intact, however, without any positive signs of penetration. The Complainant had told her mother a few days later that the Appellant had done 'something' to her.

[17] The Appellant had admitted his entertaining the Complainant and her friend at his quarters but denied any sexual intimacy with the Complainant on that occasion or having caused love bites on her. On behalf of the Appellant the principal of the school had testified that the Complainant had told him that the Appellant had tried to lure her into having sex with him but no sexual encounter had in fact taken place except some physical contacts between them.

[18] The birth certificate of the Complainant shows that she had been born on 30 November 1995 and was under 16 years at the time of the alleged incident.

[19] Before proceeding to consider the grounds of appeal, I feel it pertinent to make some observations on the applicable legal provisions relevant to this appeal. Carnal knowledge is complete on penetration to any extent [vide section 206 (4) of the Crimes Act]. It is clear that for the purpose of section 206 (4) carnal knowledge means sexual intercourse involving penetration of vulva, vagina or anus by the penis. Carnal knowledge includes sodomy [vide section 206(5)]. A person rapes another if the former has carnal knowledge with or of the other person without the latter's consent [vide section 207(2) (a) of the Crimes Act] and carnal knowledge, in so far as section 207 (2) (a) is concerned, therefore, should mean penetration to any extent of the vulva, vagina or anus of the victim by the penis of the accused.

[20] It is clear from the opinion of the assessors that they had believed that there had been sexual intercourse *i.e.* penetration to some extent of the Complainant's vulva or vagina but may have had a reasonable doubt of the element of consent, thus expressing an opinion of 'not guilty' on the charge of rape. On the other hand their opinion of 'guilty' on the count of defilement under section 215 of the Crimes Act could be explained by the fact that lack of consent is immaterial and is not a defense to a charge of defilement.

[21] The Court of Appeal in **Volau v State** Criminal Appeal No AAU0011 of 2013: 26 May 2017 [2017 FJCA 51] having referred to medical literature, made it clear that the medical distinction between vulva and vagina is immaterial under section 207 (2) (b) of the Crimes Act 2009 as far as the offence of rape is concerned as it includes both vulva and vagina and in my view, the same position applies to section 207(2) (a) of the Crimes Act 2009 as well. The following observations of the Court of Appeal in ***Volau*** dealing with a count under section 207 (2) (b) of the Crimes Act, are applicable to the facts of this case as well where the Complainant is 15 years of age and it is clear that she had difficulties in explaining the exact act and the extent of penetration by the penis that had taken place.

'It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned'

[22] I would now proceed to consider the grounds of appeal.

Ground 1

'The Learned Trial Judge erred in law and in fact when he misdirected and/or failed to provide any assistance to the Assessors about the defence to defilement.'

[23] The paragraphs which form the basis of the above ground are 10 and 26 of the summing-up and they are as follows.

'The legal definition of defilement in our case is to have sex with someone who is over the age of 13 years but under the age of 16 years. All the State has to prove to you is that there was sex between the parties and that Mere was under the age of 16. It is a legal defence to the charge of defilement if the accused shows to you in all probability that he thought that Mere was at least 16 years old ***and*** *that he had good cause to believe that she was at least 16.'*

'If you find that there was sex but you are of the view that it was with the full consent of Mere and she wasn't intimidated by the authority of the teacher then you will find him not guilty of the rape and then go on to consider the defilement count. If there was sex, you can accept from me that Mere was only 15 years old and the accused must be guilty of defilement UNLESS he has shown you, in all probability, that he believed that she was 16 years old or more and that he had reasonable cause to believe that she was of that advanced age. This is a two limb test. There is evidence that might have led him to believe she was 16, but is there evidence from him that he thought she was 16? These are questions on the evidence that you must decide. Do you have evidence from the accused that he believed her to be 16 years or more and is there evidence that he had reasonable cause to believe that?'

[24] The argument of the Appellant is that the Learned High Court Judge had used the words 'in all probability' not found in section 215(2) of the Crimes Decree thus conveying a wrong message to the assessors on the burden of proof cast on the Appellant, which according to the Appellant, was the 'balance of probability' in terms of section 59 and 61 of the Crimes Decree.

[25] However, in my view when one reads section 215(2) in the light of sections 59, 60 and 61 it appears that the burden on an accused under section 215(2) of the Crimes Act is an evidential burden of proof as contemplated in section 59 and not a legal burden of proof under section 60 and 61 and I agree with the following pronouncement of Grant CJ in **Sat Deo Shiri Wasto s/o Chandar Deo and Reginam** Criminal Appeal No 1/77 as quoted in **Sami v State** Criminal Appeal No 0046 of 2002S: 26 November 2004 [2004 FJCA 54] on the proviso to section 156 (1) of the Penal Code which is similar to section 215(2) of the Crimes Act.

'It is quite clear from this wording that an accused does not have to be satisfied beyond reasonable doubt that the girl is of or above the age of sixteen; it is only necessary for him to believe it on reasonable grounds. Moreover, it is not incumbent upon an accused to satisfy the court beyond reasonable doubt that he had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen; nor does he have to satisfy the court on the balance of probabilities. The use of the word "defence" in the proviso does not connote any shifting of the burden of proof. The proviso refers to no more than an evidential burden so that, for, an accused to fall within the exception created by the proviso, there need only be some evidence, adduced either by the prosecution or by the defence, sufficient to raise a reasonable doubt.'

[26] Therefore, I think that the decision in ***Sami*** where it had been said that the onus of proving that the person charged had reasonable cause to believe and did in fact believe that the girl was over sixteen years of age rests on the person charged and the burden of proof is on the balance of probabilities, should not be followed particularly in so far as it refers to the standard of proof on an accused as that of 'balance of probabilities' under section 215(2) in as much as in ***Sami*** the Court had no legal provisions similar to sections 59, 60 and 61 of the Crimes Act for consideration at the time of the decision.

[27] The most relevant provision of law for the first ground of appeal is Section 215 of the Crimes Decree which reads as follows.

215.— (1) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.

Penalty — Imprisonment for 10 years.

(2) It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.

(3) It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act

[28] It is clear from section 215 (2) that if and when an accused takes up the defense stated therein two requirements must be satisfied; the first is objective and the second subjective. It must be made to appear to the court firstly, that the accused 'had reasonable cause to believe' and secondly, that he 'did in fact believe' that the victim was of or above the age 16 years. This evidential burden should be discharged by adducing or pointing to evidence that suggests a reasonable possibility that both of the said requirements exist (vide section 59).

[29] Coming back to the Appellant's specific complaint, the Learned Trial Judge seems to have substituted the words ''in all probability' for the words 'did in fact believe' and

'good cause to believe' for the words 'reasonable cause to believe'. He seems to have taken it right for most part in paragraph 26 and ended by stating '*Do you have evidence from the accused that he believed her to be 16 years or more and is there evidence that he had reasonable cause to believe that?*'. This last sentence is accurate and is in line with section 215(2) of the Crimes Decree.

[30] I agree that the words complained of should and need not have been imported into section 215(2) of the Crimes Decree and the trial judges should as far as possible avoid substituting their own words for the words used by the legislature in statutes. However, I do not think that any substantial miscarriage of justice had occurred by the use of those words by the Learned Judge. Therefore, in the context of the case, I have no doubt that the omissions complained of, have not resulted in any miscarriage of justice.

[31] On the other hand, the Appellant at the trial had not taken up the defense available section 215(2) of the Crimes Decree. Neither had he run his case on that basis. If an accused is to do that he has to first admit the act of sexual intercourse or an attempt to have sexual intercourse as both acts are included in section 215(1). Admittedly, his defense had been one of 'no sexual intercourse'. In other words, he had denied having had sexual intercourse with the Complainant. In any event, upon a perusal of the evidence adduced for the prosecution and the defense, I am convinced that the evidential burden on both aspects of section 215(2) had not been discharged by the process of adducing or pointing to evidence suggesting a reasonable possibility that both of the said requirements exist. It had not been made to appear to court that both such requirements under section 215(2) did exist. The Appellant had not even remotely alluded in his evidence that he had reasonable cause to believe and he did in fact believe that the Complainant was of or above the age of 16 years. Nevertheless, the Trial Judge had addressed the assessors on both aspects of section 215(2) in his summing-up. Therefore, the error complained of with regard to the words used by the Learned Judge describing the defense under section 215(2) cannot have any bearing on the Appellant's case. Thus, I would safely apply the proviso to section 23 (1) of the Court of Appeal Act regarding the first ground of appeal and reject the same.

Ground 2

'The Learned Trial Judge erred in law and in fact when he invited the Assessors to decide the guilt or otherwise of the Appellant solely on the prosecution evidence.'

[32] With regard to this ground of appeal the Appellant's complaint is based on paragraph 21 of the summing-up which is as follows.

> '*The accused having given evidence and having called a witness leads me to another direction in law. The accused did not have to give evidence for the very reason he does not have to prove anything to you. That burden of proof is on the State and nothing the accused says or his witness says in this trial takes away that burden. You are entitled to take into account what the accused says and you may give it whatever weight you wish, however if you don't believe a word he says it doesn't make him guilty, it may just reinforce the thrust of the prosecution case in your mind. Decide the guilt or otherwise of the accused solely on the prosecution evidence.*'

[33] The Appellant complains that the sentence *'Decide the guilt or otherwise of the accused solely on the prosecution evidence.'* has the effect of conveying to the assessors that they should disregard the defense case. Taken in isolation, the impugned sentence may have had the said effect. However, it should be considered in the context of what the trial Judge had attempted to convey to the assessors in that whole paragraph and elsewhere in the summing-up.

[34] In paragraph 24, 25 and 26 of the summing-up the Learned Judge had stated as follows

> *'..... The defence says that there was no sex at all, and not even the love bites. It was just a visit to get noodles and when they got them, they left. You must first decide then if there was an act of sex or not. If there was not any sex then you will find the accused not guilty of the rape and also not guilty of the alternative charge of defilement.'*
>
> *'If you find that there was sex that night then you must go on to find if there was consent to that act..... If there was sex but no consent then you will find the accused guilty of rape and stop there - don't even consider the second count.'*

'If you find that there was sex but you are of the view that it was with the full consent of Mere and she wasn't intimidated by the authority of the teacher then you will find him not guilty of the rape and then go on to consider the defilement count. If there was sex, you can accept from me that Mere was only 15 years old and the accused must be guilty of defilement..... '

[35] Therefore, the Trial Judge had addressed the assessors fully on the alternative options in the light of the prosecution and defence evidence and drawn their attention on the Appellant's defence of denial of any sexual intercourse. I cannot find anything wrong with the above directions and in the light of the above directions and the rest of paragraph 21 of the summing-up the assessors would not have misunderstood the impugned statement *'Decide the guilt or otherwise of the accused solely on the prosecution evidence.'* to feel that they had to decide the guilt or otherwise of the Appellant solely on the prosecution evidence. It is clear that had the assessors only acted on the prosecution evidence they would not have acquitted the Appellant on the count of rape.

[36] On the other complaint of the Appellant, I have considered the decisions of **Tamaibeka v State** Criminal Appeal No.AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1 and **Bese v State** Criminal Appeal No. AAU0067 of 2011: 27 February 2015 [2015] FJCA 21, cited by the Appellant and **Chand v State** Criminal Appeal No.AAU 112 of 2013: 30 November 2017 [2017] FJCA 139, which had collectively dealt with different aspects and the essential qualities of a summing-up. I have no doubt that the Learned Trial Judge's summing-up encompasses the essential qualities of objectivity, even-handedness and balance required to ensure a fair trial. He had put before the assessors clearly and fairly, the contentions on both sides and the real matters upon which the defence was based. The Appellant's complaint on lack of fairness or objectivity in the summing-up has no merits.

[37] Therefore, I reject the second ground of appeal.

Ground 3

'The Learned Trial Judge erred in law and in fact when he misdirected the assessors using the phrase "fanciful doubt" resulting in substantial miscarriage of justice.'

[38] The Appellant argues that the Trial Judge had misdirected the assessors in paragraph 07 of the summing-up by using the word 'fanciful doubt' resulting in substantial miscarriage of justice. The portion of the said paragraph is as follows.

> *'..... The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt.* ***If you have any doubt then that must be given to the accused and you will find him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt****. The accused does not have to prove anything to you..... '*

[39] The Appellant relies on **R v. Dam** (1986) SASR 422 and **Wilson, Tchorz and Young (1986) 22 A Crim R 130** in support of his position. The Court of Appeal had dealt with an identical complaint regarding an identical summing-up in **Bijendra v State** Criminal Appeal No. AAU 0056 of 2013: 30 September 2016 [2016 FJCA 111] and stated as follows

> *'I am of the view that the impugned direction in the present case cannot be equated with or is not similar to the disapproved direction in* ***Dam*** *and* ***Wilson.*** *Though the word 'fanciful' appears in all three, the comparison ends there, for the massage conveyed by the use of the word 'fanciful' in* ***Dam*** *and* ***Wilson*** *on the one hand and in the case before us on the other hand are vastly different. The direction we are dealing with, in my mind, had not gone any further than merely warning the assessors against being influenced by fanciful or unreasonable possibilities or notions.'*

[40] The Supreme Court in **Bijendra v State** Criminal Petition No. CAV0032 of 2016: 20 April 2017 [2017] FJSC 8 has reproduced the paragraph above quoted and stated that the Court of Appeal had very rightly distinguished ***Dam*** *and* ***Wilson*** regarding the use of the word 'fanciful doubt' and approved the Court of Appeal decision. In the course of the judgment the Supreme Court had quoted **Miller v Minister of Pensions** [1947] 2 All ER 372 where Denning J. had stated

'The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'Of course it is possible but not in the least probable", the case is proved beyond reasonable doubt; nothing short will suffice.'

[41] The Supreme Court had also referred to the decision of the Privy Council in **Brown & Isaac v. The State (Trinidad And Tobago)** [2003] UKPC 10, in which the trial judge had used the phrase "*fanciful doubt*". Having considered the matter fully the Supreme Court had finally held on the use of the word 'fanciful doubt' by the Trial Judge in the summing-up as follows

'Having examined the summing-up of the learned Trial Judge in the instant case in its entirety, I am of the opinion that as in the case of Brown & Isaac, the summing up adequately conveyed the appropriate standard, and there could not have been any confusion in the minds of the assessors on account of the use of the phrase "fanciful doubt".'

'I would go further, and say that the language used by the learned Trial Judge in the instant case was simpler than the language employed by Denning J in Miller v Minister of Pensions, supra, and the trial judge in Brown & Isaac v. The State (Trinidad And Tobago), supra, and the use of the phrase "fanciful doubt" by the Trial Judge in the instant case in the manner he did, could not have caused, by itself, any confusion in the minds of the assessor.'

[42] Therefore, I conclude that the third ground also has no merits and I reject the same.

[43] In my view, neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as unreasonable. I also think, having regard to the evidence led the Appellant could have been convicted of defilement and therefore the verdict of guilt against the Appellant on the alternative count of defilement could be supported. I have no doubt that on the available evidence the case against the Appellant has been proved beyond reasonable doubt and on the whole of the facts the only reasonable and proper verdict would be one of guilt of the alternative count of defilement. At all events no substantial miscarriage of justice has occurred.

[44] Therefore, I would conclude that the appeal should stand dismissed and the conviction be affirmed.

Fernando, JA

[45] I agree with the reasons and conclusions of Prematilaka, JA.

The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL