IN THE COURT OF APPEAL
[ON APPEAL FROM THE HIGH COURT]

CRIMINAL APPEAL NO. AAU 090 OF 2014
[High Court Criminal Case No. HAC 219 of 2012]

BETWEEN : **ISEI KORODRAU**

Appellant

AND : **THE STATE**

Respondent

Coram : Prematilaka, JA
Fernando, JA
Nawana, JA

Counsel : Appellant in person
Ms. Kiran. S for the Respondent

Date of Hearing : 12 September 2019

Date of Judgment : 03 October 2019

JUDGMENT

Prematilaka, JA

[1] This appeal arises from the conviction of the appellant on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, the second count of theft contrary to section 291(1) of the Crimes Act and the third count of rape contrary to section 207(1) and 2(a) of the Crimes Act.

[2] The Amended Information alleged under the first count that the appellant on 11 February 2011 at Mariko Street, Raiwai in the Central Division broke into and entered the dwelling house of A.B. with intent to commit theft. Secondly, the appellant is alleged in the same transaction to have appropriated $525.00 cash, a 24 carat gold chain worth $800.00, a Samsung mobile phone worth $450.00 and Sony digital camera worth $600.00 all to the total value of $2,375.00, the property of A.B. with intent to permanently deprive the said A.B of the same. Thirdly, the appellant is said to have in the same transaction had carnal knowledge of A.B. by inserting his penis into her vagina without her consent.

[3] After trial, on 10 July 2014 the appellant had been convicted by the trial Judge upon unanimous opinions of the assessors and sentenced to 03 years imprisonment on the first count, 03 years imprisonment on the second count and 17 years imprisonment on the third and the trial Judge directed that sentences on all counts should run concurrently with a non-parole period of 16 years.

[4] After the appellant had filed his initial notice of appeal dated 15 July 2014, he had filed a number of amendments and submissions. The single Judge of this Court had considered the grounds of appeal against conviction set out in the amended grounds of appeal filed on 07 January 2016 at the leave to appeal stage. Amended grounds of appeal against sentence had been tendered on 31 March 2017. Both the appellant and the respondent had filed written submissions on those grounds of appeal against conviction and sentence. On the face of the said written submissions and the leave to appeal ruling, altogether 08 grounds of appeal had been urged against the conviction and two against the sentence. In the ruling delivered on 27 April 2018, the single Judge had refused leave in respect of all grounds except ground 8 against the conviction and granted leave to appeal against the sentence on both grounds of appeal.

[5] It appears that there is no written renewed application available in the copy record provided to this court. Consequent to leave to appeal ruling, the respondent has filed written submissions dated 13th August 2019 and stated *inter alia* that the appellant had stated that he would only proceed with the 08th ground of appeal against conviction allowed at the leave stage and the two grounds of appeal against sentence. The appellant

in his submissions in reply received by the registry on 23 August 2019 has confirmed that he had informed court that he would only pursue the grounds for which leave had been granted. The appellant reiterated this position orally at the hearing into the appeal.

[6] In the said written submissions in reply, the appellant has also stated that he would urge his application to lead fresh evidence as well. The application to lead fresh evidence had been tendered to court earlier on 17 September 2018 along with the appellant's affidavit of the same date. Both parties had filed written submissions on the appellant's application to lead fresh evidence too.

[7] The appellant had also filed a new set of grounds of appeal on 05 August 2018 and written submissions on them on 05 August 2019. At the hearing the state counsel admitted having received the same but not replied to those grounds as they had not been raised within 30 days of the date of leave to appeal ruling on the basis of Practice Direction No.4 of 2019 read with Practice Direction No.3 of 2018 both of which require any renewed application to be filed within 30 days of the date of pronouncement of the decision of the single Judge refusing leave to appeal. In addition Practice Direction No.4 of 2019 makes provision for the appeal to be dismissed pursuant to the inherent power of court to avoid abuse of process in the event of default of a party to adhere to the time frame of 30 days stipulated for filing and serving the renewed application on the other party.

[8] However, this Court was of the view that the said direction in the Practice Direction No.4 of 2019 would not apply to a situation where an appellant raises new grounds of appeal after the leave to appeal ruling but before the appeal hearing as such grounds cannot be regarded as renewed grounds. Rule 37 of the Court of Appeal Act on the *'Amendment of notice of appeal'* too would not come to the rescue of an appellant when totally new grounds are sought to be urged before the full court (vide **Rokodreu v State** AAU0139 of 2014: 29 November 2018 [2018] FJCA 209). The state counsel sought time to file written submissions on the new grounds of appeal and did so on 17 September 2019. The appellant informed this Court that he would rely on his written submissions regarding the new grounds of appeal. He made oral submissions on the single ground of appeal against

conviction and his application to lead fresh evidence and stated to court that he would rely on his written submissions on the two grounds of appeal against sentence.

[9] In the absence of any statuary provisions and practice directions, this Court would follow the approach adopted by the Court of Appeal in **Nasila v State** AAU0004 of 2011:6 June 2019 [2019] FJCA 84 as this Court faced a similar situation with totally fresh grounds of appeal being urged for the first time at the hearing before the full court.

[10] The appellate courts have had to deal with this unhealthy practice before and frowned upon them in no uncertain terms. In **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 the Supreme Court observed

> *'82.It is improper that litigants be allowed to argue their cases on piecemeal basis. Once a set of appeal grounds are unsuccessful, they raise another set to test whether that will hold some substance. If stringent rules are not applied where necessary, there will never be an end to litigation and there can be huge disruptions to case management in the appellate court.*
>
> *83. The Court's time is not only for a particular litigant. Access to justice is meant for all the users of the Court and if these users are allowed to come to Court as and when they think of a point that may be arguable, I say without hesitation, that a lot of the Court's resources are going to be shamefully wasted.*

[11] In **Rokete v State** AAU0009 of 2014: 7 March 2019 of [2019] FJCA 49 the Court of Appeal affirmed the above observations.

> '*'[9]……. Grounds 11-13 are the same as 01-03 grounds urged at the leave stage and the rest are completely fresh grounds of appeal. However, I am constrained to reiterate the sentiments expressed by the Supreme Court in **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 with regard to totally new set of grounds of appeal being brought before the Full Court which, I believe, is advanced more in desperation than in conviction. Time and resource of any appellate court are too precious to be sacrificed for such an exercise.'*

[12] Then, ***Nasila*** the Court of Appeal lamented the continuation of the same as follows.

> *'[9] Despite these observations the practice of submitting totally new grounds or grounds which are only marginally or remotely similar to the grounds urged at the leave to stage continues, making the time and effort of the single Judge of this court a complete waste. It is the experience of this court that in recent times it has developed to be a trend in many a case even where*

the appellant has had legal advice and representation at the leave stage. The strategy of the counsel for the appellant in such cases appears to be to try out some new arguments before the full court abandoning the grounds argued and disallowed by the single Judge in the hope that by doing so they have a better chance of succeeding in appeal. Failing in the Court of Appeal the same exercise can be seen to be adopted in the Supreme Court as well. In this regard, I can only reiterate the sentiments expressed in ***Tuwai*** *and* ***Rokete*** *against this unhealthy practice.'*

[13] In this background this Court in ***Nasila*** has taken a principled stand and adopted the test for enlargement of time to appeal in respect of fresh grounds of appeal taken up for the first time before the full court at the hearing of the appeal.

'[11] However, in my view, rules of procedure are promulgated to ensure smooth functioning and due administration of the system of courts and effective dispensation of justice in an efficient, regular and transparent manner maximising the limited resources available in the judicial system. Given the ever increasing volume of cases, it is of paramount importance that the precious time and effort of courts are used most productively without duplicating the tasks so that every litigant gets a reasonable opportunity of having his or her case heard in courts without undue delay.

[12] Therefore, procedural rules are no less important than substantive laws. They must be complied with due diligence and observed rigorously to ensure orderly conduct of the affairs of courts. This must be fully understood. At the same time, insistence on absolute compliance with procedural laws, particularly in criminal matters where freedom of individuals is at stake and where there are constitutional guarantees not to deny such freedom without following a fair procedure, there should not be a miscarriage of justice by such persistence of the very same procedure designed as a vehicle of achieving justice.

[13] When confronted with a scenario such as the one that has emerged in this instance, every court has to judiciously balance these two aspects or competing interests without sacrificing one for the other or treating one as subordinate to the other . This, no doubt is a delicate and a difficult task. The counsel, as officers of court have to be mindful and responsible not to take up totally new grounds of appeal for the first time before the full court unless in their honest and considered opinion, the failure to do so would result in very real and substantial miscarriage of justice. Needless to say, that this should be the exception rather than the norm.

[14] ***Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal****, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test*

when the full court has to consider fresh grounds of appeal after the leave stage. In other words, ***the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned****.' (emphasis added)*

[14] **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17 have been relied upon for guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed.

[15] In ***Rasaku*** the Supreme Court held

> *'[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasized in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:*
>
> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*

[16] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[17] In ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

Summary of facts

[18] Before dealing with the grounds of appeal against conviction and sentence it is pertinent to set out the relevant facts briefly. The appellant was a 19 year old unemployed youth from a village in Tailevu and was doing subsistence farming for his living. On 10 February 2011, he left his village and came to Suva to visit some friends in Raiwaqa. In Raiwaqa, he met his friends, and in the afternoon on 10 February 2011, they began to consume liquor and continued it late into the night. In the early hours of 11 February 2011, the appellant left his friends and started wandering around nearby streets in Raiwaqa and Nailuva Road.

[19] The complainant was 29 years old Australian expatriate, working in a managerial position, in one of the higher educational institutes in Fiji. She was fast asleep in her apartment in Suva. Sometime after 01a.m. on the 11th morning, the appellant entered the complainant's apartment. He saw the complainant's apartment's front slide door open, but the burglar grill door was closed and locked. The burglar grill door key was on a coffee table near the front slide door. The appellant 'fished' for the key by using a mop stick. He then opened the burglar grill door, and went inside the complainant's apartment. The accused was looking for money. The complainant, at the time, was fast asleep alone in her bedroom. The accused took a kitchen knife from the complainant's kitchen, went to her bedroom and forcibly woke her up by putting the kitchen knife to her neck. When she tried to scream he covered her mouth and warned her if she screams he would kill her.

[20] He demanded money from the complainant and she gave him various currencies. He also took the complainant's properties itemized in the second count of the Information. He later dragged her to the sitting room, and pinned her to the floor by holding her neck with his hand. She decided not to struggle, and the appellant forcefully took her back to the bedroom. In the bedroom he demanded sex from the complainant while still holding the knife to her neck. Under duress the complainant obliged and the appellant had sexual intercourse with her twice and ejaculated inside her. After that the appellant left the complainant's apartment in the early morning of 11 February 2011.

[21] The matter was reported to police later and an investigation was carried out. The complainant was medically examined approximately 8 to 8 ½ hours after the alleged rape at CWM Hospital. Medical evidence reveals her injuries as *'...Throat - tender; Left Arm – 1 cm laceration along inner aspect, dried clot; vagina – slight abrasion on labia minora; white liquid in vaginal vault..'* and '*... Recent sexual activity...'* . It would appear that the medical report confirms the complainant's version of events. The appellant was arrested by police at Tailevu on 23 February 2011. He was cautioned on 24 and 25 February 2011 and was formally charged for the offences on 25 February 2011.

[22] I shall now consider the appellant's renewed ground of appeal. It reads as follows:

> '*The learned trial Judge shifted the burden of proof when he directed the assessors at paragraph 29 of his summing up; "It was not clear from the evidence whether or not the accused was part of line up of the police identification parade." The learned trial judge misdirected the assessors when he said; "The complainant's identification evidence is solid". He was telling the assessors to find me guilty."*

[23] It is clear that the appellant's complaint is based on the directions given to the assessors in paragraph 29 of the summing up which is as follows:

> *'29. How long did the complainant have the accused under observation? According to the complainant, she saw the accused for a total of 2 hours. So, this case was not a fleeting glance. At what distance? The complainant said, the accused kissed her and had sex with her twice. So, obviously the two were close to each other, most of the time. This will surely enable the complainant to see the accused's face properly for a period of 2 hours. In what light? The alleged rape occurred in her bedroom. The complainant said, the bedroom*

lights were on, thus enabling her to see his face properly. Was the observation impeded in any way? Obviously, no. Had the witness ever seen the accused before? No. Is there any special reason for remembering the accused's face? Obviously, the complainant's traumatic experience will remind her of the accused's face, possibly forever. Any weakness in the complainant's identification evidence? In cross-examination, the complainant admitted she attended a police identification parade, and could not point out the accused. However, it was not clear from the evidence, whether or not the accused was part of the line up in the police identification parade. On the whole, in my view, the quality of the complainant's identification evidence appears solid. However, whether or not you accept the same, is a matter entirely for you.' (Emphasis added)

[24] The appellant contends that he was part of the police identification parade and the complainant did not identify him. He further states in his submissions in reply that according to the complainant the perpetrator spent about two hours with her and therefore, her failure to identify him at the identification parade as the culprit casts serious doubts on her dock identification of him as the person who committed the alleged crimes making her evidence unsafe, dangerous and unreliable as far as his identity is concerned. He also argues that first time dock identification is unsafe and unsatisfactory and reliance placed on the complainant's 'mistaken' dock identification by the High Court has caused a substantial and grave miscarriage of justice.

[25] Therefore, it is clear that apart from the alleged misdirection in the summing up, the appellant has now expanded his ground of appeal to include his dock identification *per se* at the trial where the complainant had testified *'I saw him for a period of 2 hours, when he was with me, If I see the person again I will recognise him. He is in the courtroom.'* On a perusal of the evidence led at the trial, there does not appear to be conclusive evidence that the appellant was part of the police identification parade though it is clear that the complainant had not identified anyone at the parade. Despite the appellant having had counsel defending him throughout the trial, no questions had been put to the police officers who gave evidence at the trial as to whether the appellant was present at the parade though he was not obliged to do so. The appellant had remained silent and not called any witnesses and therefore, there was no evidence (or even a suggestion) from him either to the effect that he was part of the parade. I have even examined the proceedings at the *voir dire* inquiry where the appellant gave evidence but cannot find

any evidence (or a suggestion) to confirm the presence of the appellant at the parade. Therefore, in the circumstances the trial Judge cannot be faulted for telling the assessors ' *However, it was not clear from the evidence, whether or not the accused was part of the line up in the police identification parade.'*

[26] Lack of clear evidence as to the presence of the appellant at the parade also affects the weight of the appellant's complaint that the complainant's failure to identify him at the police identification parade should be viewed as casting a serious doubt of his identity and his complicity in the alleged crimes. Had the appellant been not present at the identification parade the complainant's failure to identify him should not come as a surprise.

[27] The learned trial Judge also gave the following direction on identification guidelines at paragraph 28 of the summing up.

> *'Before you consider the complainant's identification evidence of the accused, at the material time, I must, as a matter of law, direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one identification of the accused which the defence alleges to be mistaken, I must warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness could be mistaken. Secondly, you must closely examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Is there any special reason for remembering the accused's face? How long elapsed between the original observation and the subsequent identification to police? Thirdly, are there any specific weaknesses in the complainant's identification's evidence? You must consider the above three issues together to test the quality of the identification evidence. If the quality is good, you may rely on it. If it is otherwise, you may reject it.*

[28] **Turnbull** [1977] QB 224 laid down important guidelines in the face of widespread concern over the problems posed by cases of mistaken identification**,** for judges in trials that involve disputed identification evidence. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special

need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:

1. caution is required to avoid the risk of injustice;
2. a witness who is honest may be wrong even if they are convinced they are right;
3. a witness who is convincing may still be wrong;
4. more than one witness may be wrong;
5. a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:

a) the length of time the accused was observed by the witness;

b) the distance the witness was from the accused;

c) the state of the light;

d) the length of time elapsed between the original observation and the subsequent identification to the police.

[29] It is clear that the directions in paragraph 28 and 29 of the summing up are substantially in terms of Turnbull guidelines though such directions need not be given unless the prosecution case depends wholly or substantially on visual identification. It cannot be said that in the case against the appellant that the prosecution relied on visual identification whole or substantially. Yet, the trial Judge had given those directions tailored to the facts of the case and he cannot be criticized in that regard.

[30] The appellant relies on **Edwards v. Queen** [2006] UKPC 23 (25 April 2006) and **Lawrence v The Queen** [2014] UKPC 2 (11 February 2014) to buttress his argument that there is inherent danger in dock identification and that it is an unreliable practice. In **Edwards** the Privy Council has referred to first time dock identification as a 'serious irregularity' which should be permitted in exceptional circumstances. Further, the Court said that it is in general an undesirable practice and other means should be adopted of establishing that the accused in the dock is the man who was arrested for the offence

charged and that when the evidence had been admitted it was incumbent upon the judge to direct the jury to give it little or no weight.

[31] In **Lawrence** the Privy Council said:

> *'In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: Aurelio Pop v The Queen [2003] UKPC 40; Holland v H M Advocate [2005] UKPC D1, 2005 SC (PC) 1; Pipersburgh and Another v The Queen [2008] UKPC 11; Tido v The Queen [2012] 1 WLR 115; and Neilly v The Queen [2012] UKPC 12.'*

[32] In **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 where dock identification evidence has been led but the trial judge has not given even the Turnbull directions, the Supreme Court of Fiji had discussed a complaint arising from the dock identification and seemingly followed the above pronouncements. The court said:

> *'The dangers of a **dock identification** (by which it is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognises him, but because the witness knows from where the defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to a **dock identification** , it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account". (*emphasis added)

[33] **Lotawa v The State** [2014] FJCA 186 the Court of Appeal said:

> ***'Dock identification** is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness – the person to be identified is sitting in the dock ... It has been decided now in a line of English cases that it should be refused by a trial judge except in situations where the accused has refused to participate on a formal identification parade or where he has otherwise avoided attempts at*

identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.'

[34] In **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, the Court of Appeal did not disapprove of dock identification because (i) the witness had seen the suspect twice before, on both occasions under good lighting, and (ii) there had been 8 defendants in the dock and though there had been a failure on the part of the judge in respect of the dock identification, nevertheless had gone on to hold that no prejudice had been caused despite lack of Turnbull direction.

[35] However, the Supreme Court in ***Naicker*** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty and answered the question in the affirmative. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial Judge. The test to be applied is found in the following paragraph.

> *'45. I return to the irregularities in the trial as a result of the* ***dock identifications*** *and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a "substantial miscarriage of justice" occurred?.....The question, in my opinion, is whether the judge* ***would*** *have convicted Naicker of murder if there had been no* ***dock identification*** *of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge* ***could*** *have convicted Naicker without the* ***dock identifications.*** *The question now is whether he* ***would*** *have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the* ***dock identifications,*** *the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.' (*Emphasis added*)*

[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors *could* express the opinion that he was guilty, and on which the judge *could* find him guilty. Secondly, whether the judge *would* have convicted the appellant, had there

been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.

[37] Another relevant fact in this connection is that unlike in many a jurisdiction in the commonwealth where the members of the jury are considered the sole judges of fact, the likely effect of lack of warning on the assessors on first time dock identification of the accused, on the conviction should be judged in the light of the now well-established position in Fiji that the decision on guilt or innocence of an accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.

[38] Thus, in Fiji the proviso to section 23(1) of the Court of Appeal Act would be more readily applied in the face of a complaint based on dock identification and lack of warning if the conviction is not unreasonable or could be supported having regard to the evidence as envisaged in section 23(1) of the Court of Appeal Act which means that no substantial miscarriage of justice has occurred.

[39] I shall now consider the appellant's main ground of appeal on identification in the light of the above legal propositions. It is true that the learned trial Judge had not warned the assessors of the dock identification. In other words he had not told them about the undesirability and dangers of dock identification or to give it little or no weight or that they should not take that into account. Nevertheless, the trial Judge had given Turnbull directions on identification to the assessors.

[40] From the evidence it is clear that the appellant had been with the complainant for about 02 hours (not a fleeting glimpse) and she had ample opportunity of recording his identification features in her mind.

[41] Two counsel defended the appellant at the trial and sought redirections at the end of the summing up on a couple of points but not on dock identification. The appellate courts have time and again commented upon the failure in not raising appropriate directions with the trial judge resulting in the appellate court not looking at the complaints against the summing-up based on such misdirection or non-directions favorably. Thus, the appellate courts would be slow to entertain such a ground of appeal or even disregard it completely if the failure appears to be deliberate (vide **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12**, Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17). Since the appellant's counsel had sought directions on other points, the failure to raise any redirection on dock identification seems deliberate, particularly in the absence of any cogent reasons adduced for not doing so and that alone is sufficient to disregard such a point of appeal.

[42] In any event, the caution statement of the appellant was led in evidence which *inter alia* establishes him as the perpetrator of the crimes alleged in the information. The appellant had admitted committing all offences in the information. He had spoken to consent in relation to the first act of sexual intercourse. The appellant's answers in the caution interview are by and large consistent with the narrative of the complainant at the trial as to the ordeal she had to face in that night. The appellant had raised his third ground of appeal at the leave stage on the footing that *nolle prosequi* had been entered in another case which was based on the same caution interview in 2011 held to be forced by the police and the present case had been filed containing the same charges in 2014 on the same facts. The single Judge had dismissed it as follows in the Ruling dated 27 April 2018.

> *'Ground 3 alleges that his admissions in the caution interview were found to have been forced by the Police at the trial in which a nolle was entered by the State. A perusal of the High Court file in HAC 57 of 2011 indicates that the trial had not commenced and that there had not been any voir dire procedure. This ground is also vexatious and is dismissed under section 35(2) of the Act.'*

[43] Once a ground of appeal is dismissed under section 35(2) of the Court of Appeal Act on the basis that it is vexatious or frivolous, the same cannot be renewed under section 35(3). Therefore, there is no challenge before this court at this hearing to the admissibility of the caution interview which without any doubt proves the identity of the appellant.

[44] In the circumstances, while I hold that the renewed ground of appeal based on the identification parade as formulated has no merit, I am of the view that his further submissions expanding it to include the dock identification has merit and should be decided in his favour. Nevertheless, I am satisfied that the appellant's caution interview quantitatively and qualitatively has proved beyond reasonable doubt his identity without the evidence of dock identification. Therefore, applying the two tier test formulated above I have no doubt that the assessors could express the opinion that he was guilty and the trial Judge could find him guilty and further that the judge would have convicted him of all charges. Thus, I hold that no substantial miscarriage of justice has occurred and dismiss the appeal on the renewed ground of appeal in terms of the proviso to section 23(1) of the Court of Appeal Act.

[45] I shall now proceed to consider the belated new grounds of appeal applying the test for enlargement of time.

[46] The first fresh grounds of appeal are as follows:

(i) *' The learned trial judge erred in law when he did not direct the assessors in their role to consider that truth and weight to be attached on the appellant's alleged disputed confession giving rise to a substantial miscarriage of justice.'*

(ii) *'The learned trial judge's illustration in the summing up regarding the example of aggravated burglary gives rise to a highly possibility of being prejudiced.'*

(iii) *'Lack of adequate direction regarding the elements of theft'*

Reasons for the failure to file within time

[47] There are no reasons given by the appellant for the delay in coming up with the above grounds of appeal. His first notice of appeal against conviction and sentence is dated 15 July 2014 and timely. Amended grounds of appeal against sentence had reached the registry on 23 December 2014. Additional grounds of appeal against sentence had been filed on 07 August 2015. The appellant had then filed detailed amended grounds of appeal and submissions dated 11 January 2016. Further grounds of appeal had been received on 20 April 2017 against conviction. Amended grounds of appeal against sentence had been tendered on 31.03.2017. None of them contained the fresh grounds of appeal against conviction submitted on 05 August 2019.

The length of the delay.

[48] The three new grounds of appeal against conviction are late by almost 05 years and therefore, the delay is *prima facie* substantial and unacceptable.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

[49] Having examined the decisions in **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sione Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019, the Court of Appeal held in ***Nasila*** (supra) that the test for allowing fresh grounds if appeal is whether they have a real prospect of success. ***Nasila*** articulated it as follows.

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a* ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a very substantial delay such as this does not deserve to reach the stage of full court hearing.'*(Emphasis added)

[50] The Supreme Court in ***Rasaku*** as follows:

> '*[19]* ***Enlargement of time has generally been permitted by courts only exceptionally****, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.'*

New grounds of appeal against conviction

[51] I shall now examine the first fresh ground of appeal

> *' The learned trial judge erred in law when he did not direct the assessors in their role to consider that truth and weight to be attached on the appellant's alleged disputed confession giving rise to a substantial miscarriage of justice.'*

[52] The appellant's complaint is based on paragraph 32 of the summing up which is as follows. However, paragraph 33 is also relevant in this regard.

> *'32. Before you consider the above alleged confession, I must direct you as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statement voluntarily, that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused.'*

> *'33. In this case, the issue on whether or not the alleged confessions were given voluntarily, were disputed by the parties. Although the accused choose to remain silent, and call no witnesses, in his defence, he nevertheless put his challenge to the prosecution's witnesses. He challenged the police arresting officer (ie. Amani Bosenawai – PW4) through cross-examination, that they assaulted him during his arrest on 23 February 2011. He also challenged the caution interview officer (PW5) and the witnessing police officers (PW6 and PW7) that they assaulted and threatened him during his caution interview. He accused them of rubbing chillis on his body, and threatening to take him to the army camp, and the "police strike back team". He also accused the officers, through cross-examination, that they repeatedly swore at him. He also repeated the above challenges, when he cross-examined the charging officer, DC 3650 Semi (PW9). However, all the above police officers said, that they did not assault, threaten or made promises to the accused, while he was in their custody. They said, the accused gave his caution interview and charge*

statements voluntarily. Which version of events to accept, is entirely a matter for you.'

[53] The appellant submits that the trial Judge had failed to address the assessors on the truth and weight attached to the caution interview. It is clear from the outset that the appellant challenged the caution interview on the basis of voluntariness; not on the premise that he never made it; or even if he made it, it was not true.

[54] Having examined several previous authorities the Court of Appeal in **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 stated as a general proposition on how to direct the assessors on a caution interview as follows.

' 20 (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'

[55] However, the Court of Appeal in ***Volau*** also correctly stated (referring to **Prasad v The Queen** [1981] 1 A. E. R 319 and **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30]) that the likely effect of any misdirection, non-direction or irregularity on the aspects of making, voluntariness, probative value (*i.e.* truth) and weight (*i.e*. sufficiency) of a confessional statement upon the decision of the assessors should be judged in the light of the now well-established position in Fiji that the decision on guilt or innocence of an accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.

[56] The Supreme Court had earlier remarked in **Boila v The State** CAV005 of 2006S: 25th February 2008 [2008] FJSC 35 *'The adequacy of a particular direction will necessarily depend on the circumstances of the case'.*

[57] Before ***Volau*** the Supreme Court in **Khan v State** CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, said that *'There is no incantation which must be read here. The required guidance need not be formulaic.'*

[58] The Supreme Court reinforced these remarks recently in **Tuilaselase v State** CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows.

> *'26.The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*
>
> In paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight'.
>
> *".....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".*

[59] What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (*see* ***Volau, Boila,*** **McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276, **Kalisoqo v R** Criminal Appeal No. 52 of 1984) which the trial judge had given in the summing up.

[60] Therefore, it appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the

circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant.

[61] This judicial approach could also be supported by having regard to section 23 of the Court of Appeal Act which permits the appellate court to allow an appeal only if it thinks that the verdict should be set aside either because it is unreasonable or cannot be supported having regard to the evidence or if it thinks that the judgment should be set aside on the ground of a wrong decision of any question of law or on any ground involving a miscarriage of justice. Yet, the proviso to section 23 empowers the court to dismiss the appeal even if the point raised in appeal might be decided in the appellant's favour but no substantial miscarriage of justice has occurred. No verdict or judgment could be challenged under section 23 on the basis that it is unsafe or unsatisfactory (vide **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24) and **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98). No omission or misdirection in the summing up *per se* would be fatal to a conviction if it could be supported or sustained on evidence led at the trial.

[62] As already pointed out, the appellant had not taken up the position at the trial that he never made the confessional statements. Nor had he said that even if he had made it the contents were not true. He only challenged the voluntariness by way of cross-examination and not by himself giving evidence. Yet, in paragraph 33 of the summing up the trial Judge had placed voluntariness fairly and squarely at the feet of the assessors though it had been already decided by him at the *voir dire*. Having considered all the circumstances relating to the making of the caution interview, the consistency of its contents with the complainant's evidence and paragraph 32 and 33 of the summing up, I am satisfied that even if the trial Judge had addressed them specifically on the weight and truth of the caution interview no reasonably minded assessors would have expressed a different opinion. Neither would that omission have affected the trial Judge's decision to agree with assessors. In other words the non-directions specifically on 'weight' and

'truthfulness' complained by the appellant would not have made any difference to the opinion of the assessors or the verdict of the Judge.

[63] Therefore, in the context of the case, I have no doubt that the omissions complained of, have not resulted in any miscarriage of justice and the first ground of appeal is devoid of any merit. Therefore, there would not be any need even to invoke the proviso to section 23 (1) of the Court of Appeal Act regarding the first ground of appeal. Therefore, the first ground of appeal is unlikely to succeed and has no real prospect of success.

Second fresh ground of appeal

> '*The learned trial judge's illustration in the summing up regarding the example of aggravated burglary gives rise to a highly possibility of being prejudiced.'*

[64] The appellant has highlighted *'For example, a thief, who enters or remains in someone's house, as a trespasser with an intention to commit theft, gets hold of a kitchen knife, which would be an "offensive weapon", to assist him commit the offence, would be liable for "aggravated burglary"* in paragraph 11 of the summing up as the offending sentence. His complaint seems to be that the illustration closely resembles the facts of his own case seriously affecting his defence and caused prejudice to him.

[65] When a similar complaint was made in **Chand v State** AAU112 of 2013: 30 November 2017 [2017] FJCA 139 the Court of Appeal cautioned the trial Judges in the following words

> *'This Court has on numerous occasions cautioned and even warned the trial judges against using examples in the summing up which could easily be related by the assessors to the facts before them. These kind of examples could have a lasting memory in the assessors in their deliberations at the end and should be avoided by the trial judges at all times…'*

[66] However, the gist of the complaint in *Chand* was that the examples to demonstrate the physical element of murder were similar to or the same as the allegation against the appellant for which, however, there was no conclusive evidence to implicate the him and the conviction was dependent almost exclusively on the alleged dying declarations of the

deceased where, as against them, there was strong evidence presented by the defense consistent with an inference favorable to the appellant.

[67] However, in **Balekivuya v State** AAU0081 of 2011: 26 February 2016 [2016] FJCA 16 the Court of Appeal held;

> *'Although the practice of using examples that too closely resemble the facts upon which the prosecution relies is not appropriate, in this case there was nothing added to the prosecution case. There was direct evidence from two witnesses who had survived the assaults as to how Krishneel had met his death. In my judgment the Appellants were not prejudiced by the use of the similar examples in this case.'*

[68] In **Yang Xieng Jiong v State** AAU0077 of 015: 7 March 2019 [2019] FJCA 17 the Court of Appeal remarked

> *'[42] It appears that the learned counsel's complaint, in this case, stems from the learned trial judge's choice of one of the illustrations as noted above that resembled the facts of the case had before them. I am of the view that a judge's choice of an illustration closer to the facts of the case cannot be faulted if the illustration had, in fact, confined to the exact facts of the case in an appropriate manner.'*

[69] It is clear from the evidence before this Court that there was evidence to justify the illustration given on aggravated burglary in the form of the complainant's evidence and the caution interview of the appellant. His complaint has no merits. Therefore, the second ground of appeal is unlikely to succeed and has no real prospect of success.

Third fresh ground of appeal

> *'Lack of adequate direction regarding the elements of theft'*

[70] The appellant's complaint is founded on the alleged inadequacy of explaining the element of 'dishonestly' to the assessors in the summing up. The term 'dishonest' is defined in section 290 of the Penal Code and it should be read with section 292 setting out special rules about the meaning of the word 'dishonest'. Section 290 is as follows:

> *'290. for the purposes of this Part, dishonest means —*
>
> *(a) dishonest according to the standards of ordinary people; and*

(b) known by the defendant to be dishonest according to the standards of ordinary people.'

[71] Section 292 states:

> *'292. — (1) for the purposes of this Division, a person's appropriation of property belonging to another is taken not to be dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.*
>
> *(2) Sub-section (1) does not apply if the person appropriating the property held it as trustee or personal representative.*
>
> *(3) for the purposes of this Division, a person's appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property.'*

[72] It is clear that the legal burden of proving the element of 'dishonest' is on the prosecution and it has to be discharged beyond reasonable doubt. When the trial Judge in paragraph 06 of the judgment dated 10 July 2014 states that *'I accept the complainant's evidence that the accused committed aggravated burglary, theft and rape against her'* it necessarily means that he is satisfied that all elements of the offence of theft including 'dishonestly' have been proved beyond reasonable doubt. In Fiji that the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict (vide **Prasad v The Queen** [1981] 1 A. E. R 319, **Noa Maya v. State** Criminal Petition No.CAV 009 of 2015: 23 October [2015 FJSC 30], **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 and **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98). Therefore, the non-directions or omissions complained of by the appellant has been addressed by the trial judge in the judgment and has no merit.

[73] If the appellant is to rely on section 292(1) to rebut the element of 'dishonest', he carries the evidential burden of proof in terms of section 59 (7) of the Crimes Act. I do not find any evidence either in the prosecution case or at least in the suggestions put in cross-examination to the prosecution witnesses that suggests a reasonable possibility that the appellant has appropriated the complainant's property in the belief that the person to

whom the property belongs cannot be discovered by taking reasonable steps. Therefore, no direction to the assessors in that regard is required.

[74] Therefore, the third ground of appeal is unlikely to succeed and has no real prospect of success.

If time is enlarged, will the respondent be unfairly prejudiced.

[75] The appellant has prayed for a retrial based on the new grounds of appeal. Respondent in this appeal is the State and it cannot be said that the State would not be unfairly prejudiced as a result of an extension of time. In the case of a retrial after a long delay such as 05 years and the fact that the complainant is a foreign national could mean that there is every possibility that the vital witnesses for the prosecution, particularly the complainant due to her having possibly left the jurisdiction and police officers due to reasons such as overseas duty etc. may not be available hampering the conduct of the prosecution and unfairly prejudicing the State.

[76] In the circumstances, I refuse to grant enlargement of time as far as all three new grounds of appeal against conviction are concerned. Accordingly, leave to appeal should also be refused, as the threshold for leave to appeal is lower than that of enlargement of time.

Application to lead fresh evidence

[77] The appellant's application to lead fresh evidence is in the form of proceedings in case No. HAC 242 of 2011 where, he says, he had complained to the Magistrate that he had been assaulted, threatened and forced to confess to the offences in the present appeal arising from High Court Case No. HAC 219 of 2012 but the learned Magistrate had not noted his complaint in the proceedings. According to his affidavit he was arrested on 23 February 2011 in respect of offences in both cases. When he first appeared in the High Court in case No. 242/2012, the appellant claims to have once again complained to the High Court Judge who had recorded it and directed the police to take him for medical examination. The appellant seeks to lead that evidence to demonstrate that his caution interview led in this case was not voluntary. Those proceedings in case No. HAC 242 of 2011 (attached to his affidavit) and a medical certificate pertaining to an examination of

the appellant performed on 26 February 2011 are available in the copy record. According to his affidavit those proceedings were not available to him during the trial which led to the present appeal.

[78] It must be noted at the outset that the fresh evidence sought to be led is only relevant to the admissibility of the caution interview. The grounds of appeal considered at the leave stage in relation to the admissibility of the caution interview were ground 3 and 7 both of which were refused by the single Judge. Those grounds have not been renewed by the appellant. Therefore, the evidence in the form of proceedings in case No. HAC 242 of 2011 is of no relevance to any of the grounds already considered by this court.

[79] Section 28 of the Court of Appeal Act, provides that the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice receive fresh evidence by way of documents or witnesses (see **Mudaliar v State** Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 and **Chand v State** CAV0014 of 2010: 9 May 2012 [2012] FJSC 6).

[80] In **Tuilagi v State** AAU0090 of 2013: 14 September 2017 [2017] FJCA 116 the Court of Appeal considered several past decisions and held that the main criteria for fresh evidence at the appeal stage is set out in **Ladd v Marshall** [1954] 3 All ER 745.

> *'[36] The Supreme Court in **Mudaliar** quoted with approval **Ladd v Marshall** [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well.*
>
> *(i) the evidence could not have been obtained prior to the trial by reasonable diligence;*
> *(ii) it must be such as could have had a substantial influence on the result and*
> *(iii) it must be apparently credible.'*
>
> *'[37] **Tuimereke v State** Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to **Ratten v R** [1974] HCA 35; (1974) 131 CLR 510 and **Lawless v R** [1979] HCA 49; (1979) 142 CLR 659. In both **Ratten** and **Lawless** the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.'*

> *'[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:*
>
> *"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."*

[81] The appellant was defended by counsel at the trial. Had the proceedings in HAC 242/11 attached to his affidavit before this court been so crucial to his defence, there is no reason (no reason has been adduced anyway) that they could not have been obtained then with reasonable exercise of due diligence.

[82] I have examined the proceedings in HAC 242/11 sought to be led in evidence and find that on 15 August 2011 the appellant had informed court that he had been assaulted by police and on 07 September 2011 he had requested court to take him to hospital regarding an injury caused at the time of his arrest and the trial Judge had directed the prison authorities to take him for a medical examination. The appellant, however, had admitted at the *voir dire* inquiry that he had not got a medical report from this second examination.

[83] First medical examination had been done on 26 February 2011 after the caution interview on 24 February 2011 and the doctor had only seen an injury on his lower lip. According to police officers the injury was already there when the appellant was arrested. Though the appellant had said at the *voir dire* inquiry that he complained to the doctor of a police assault, the doctor had recorded a history of an assault by his uncle in the village about 03 days ago causing the injury to his lower lip. The doctor had not been challenged on this evidence. Further the medical examination had not revealed any other injuries, particularly to the sole of his feet, ribs, head and back as alleged by the appellant at the *voir dire* inquiry.

[84] The appellant had further admitted at the *voir dire* inquiry that he never complained to the Magistrate (26 June 2012) or the High Court Judge (06 July 2012) when produced in respect of the present case bearing no. HAC 219/2012.

[85] Therefore, I am fully convinced that the piece of evidence sought to be produced would not have made any difference to the result of the *voir dire* inquiry or of the trial.

[86] I am also of the view that little credibility could be attached to the allegation of the alleged police assault as a result of the proposed evidence sought to be led in appeal.

[87] I have no doubt that it is neither necessary nor expedient in the interest of justice to receive fresh evidence as urged by the appellant at this stage and no miscarriage of justice would occur without such evidence. Accordingly, the appellant's application for fresh evidence is refused.

Grounds of appeal against sentence

[88] The grounds of appeal against sentence are set out in an undated document that has a date stamp of 31 March 2017. The first ground relates to the non-parole term of 16 years as being too close to the head sentence of 17 years and as a result not affording the appellant the opportunity to re-habilitate. The second ground claims that the head sentence of 17 years for the rape conviction was excessive on account of the sentencing Judge considering irrelevant matters.

> '***Non-parole term of 16 years as being too close to the head sentence of 17 years and as a result not affording the appellant the opportunity to re-habilitate.'***

[89] The Learned Trial Judge while sentencing the Appellant to 17 years imprisonment had fixed the period during which he is not eligible to be released as 16 years in terms of section 18(1) of the Sentencing and Penalties Decree. Section 18(4) states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 16 years fixed by the Trial Judge is in compliance with section 18(4).

[90] However, the complaint of the Appellant is that the non-parole period of 16 years has the effect of denying or discouraging the possibility of rehabilitation and is inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20. Secondly, he also argues that the

trial Judge had not given an explanation why he had fixed a non-parole period of 16 years. According to him both constitute errors in sentencing discretion.

[91] This first argument is based on section 4(1) of the Sentencing and Penalties Decree coupled with section 27(2) of the Correction Service Act, 2006 (previously known as Prisons and Corrections Act 2006) which is as follows.

> *27. (1) All convicted prisoners shall be classified in accordance with the procedures prescribed in Commissioners Orders.*
>
> *(2) For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month.'*

[92] Section 28 of the Correction Service Act, 2006 also deals with remission as follows.

> **'***Remission of sentence*
>
> *28. (1) The remission of sentence that is applied at the initial classification shall thereafter be dependent on the good behaviour of the prisoner, and it may be forfeited and then restored, in accordance with Commissioners Orders.*
>
> *(2) The Minister may grant further remission upon the recommendation of the Commissioner given in accordance with any criteria prescribed by Regulations or the Commissioners Orders.*
>
> *(3) Procedures for appeal against a decision to forfeit any entitlement to remission may be prescribed by Regulations or Commissioners Orders.'*

[93] The Appellant relies on the decision of the court of Appeal in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20 where the Court of Appeal reduced the non-parole period from 07 years (fixed by the High Court) to 06 years on the head sentence of 08 years on the following reasoning;

> ***'**[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, **it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the***

possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. *It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.*

[94] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> "*While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case***."
>
> *"…. was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission".*

[95] In **Singh v State** AAU009 of 2013: 30 September 2016 [2016] FJCA 126 the Court of Appeal stated:

> '*I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'*
>
> '*Further it cannot be said that fixing a non-parole period is the only manner by which conditions for promotion and facilitation of rehabilitation can be established. Rehabilitation in my view is a part of the duties of the Correction Institute and should be afforded to all inmates.'*

[96] However, ***Singh*** has not cast any doubt on the reasoning in ***Tora*** as to the considerations that should be taken into account when fixing the non-parole period as the former has discussed only section 18(2) and (4) of the Sentencing and Penalties Decree 2009.

[97] The Supreme Court in **Kean v State** CAV0007 of 2015: 23 October 2015 [2015] FJSC 27 where the Court of Appeal had fixed a non-parole period of 13 years to the head sentence of 14 years, made the following observations on section 27(2) and 28(1) of the (then Prisons and Corrections Act 2006 (currently named as Corrections Services Act, 2006). ***Kean*** has not referred to ***Tora.***

> *'...but in the light of the way the sections have been drafted, it looks as if an offender does not have the legal right to have any part of his sentence remitted. Whether he might have a legitimate expectation that one-third of his sentence would be remitted if he was of "good behaviour" while in prison is another matter.*
>
> *'Unless the nature of the offence or the past history of the offender made the fixing of a non-parole period inappropriate, **the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender is not eligible to be released on parole**. A number of authorities have held that this provision was not intended to provide for the early release of offenders once they had completed the non-parole period. The non-parole period was intended to be the minimum period which the offender would have to serve. In other words, it was intended to require the court to ensure that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission. Having said that, there is, as yet, no Parole Board in place in Fiji to consider the release of prisoners on parole.'*
>
> *'We can take judicial notice that the current practice is to release the offender once he has served two-thirds of the difference between the primary sentence and the non-parole period.'*
>
> *'The difficulty with this argument is that it focuses, not on "the prescribed punishment for the offence", but on how the grant of remission works in practice ..... **But it is not the prescribed punishment for the offence which has the effect of making the sentence which the Court of Appeal substituted for that of the trial judge more severe than the one which the trial judge passed. It is how the Commissioner calculates remission in cases where a non-parole period has been fixed.'*** (emphasis added)

[98] Earlier, in **Wise v The State** CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7 the Supreme Court considered a complaint by a Petitioner that imposing of non-parole period of 05 years upon a head sentence of 07 years was wrong in law and the Chief Justice said as follows:

'[24] The penalty for aggravated robbery set by law is 20 years [section 311(1) Crimes Decree]. Having arrived at a sentence of imprisonment within the range for such offences ***the sentencing court must fix a non-parole period – section 18(1) of the Sentencing and Penalties Decree.'***

[99] The Supreme Court once again in **Bogidrau v State** CAV0031 of 2015: 21 April 2016 [2016] FJSC 5 had to deal with the challenge to a non-parole period of 05 years on the head sentence of 06 years and 06 months, on the basis that that there was insufficient gap between the head sentence and the non-parole period. The observations of the Supreme Court are as follows.

'6. Section 18(4) of the Sentencing and Penalties Decree provided that the non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:

(i) "[T]he non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent": per Calanchini P in ***Tora v The State*** *[2015] FJCA 20 at [2].*

*(ii) "[T]he sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court. It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment": **Raogo**, op cit, at [24].'* (Emphasis added)

'I repeat what I said earlier lest the emphasis I wish to convey is lost. One might have expected the Commissioner's practice to have been to release the prisoner either when he has served two-thirds of his sentence or on the expiry of the non-parole period, whichever is the later. That would reflect both the desirability of encouraging the prisoner's rehabilitation if he has behaved while in prison, as well as the need to reflect the sentencing judge's view of the length of time that the prisoner should actually serve. Many people might say that the Commissioner's current practice does neither. I encourage the Commissioner to review his practice in the light of this judgment.' (emphasis added)

[100] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."

[101] Thus, ***Bogidrau*** had adopted the two principles set out in ***Tora*** and ***Raogo*** with regard to some guidelines in fixing the non-parole period. On the other hand in both ***Kean*** and ***Bogidrau*** the Supreme Court indicated that it would be desirable for a prisoner aggrieved by the current practice of remission to seek judicial review so that the court could look into its legality because it is not, according to the Supreme Court, how judges fix the non-parole period but how the remission is presently calculated that makes the sentence more severe. Accordingly, the Supreme Court dismissed the appeals in both cases though special leave was granted on the ground of appeal that a non-parole period had been fixed and it had been too close to the head sentence.

[102] In **Turogo v State** CAV 0040 of 2016: 20 July 2017 [2017] FJSC 17 the Supreme Court had cited ***Bogidrau*** with regard to the two principles enunciated in ***Tora*** and ***Raogo*** *i.e.* (a) The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation; Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent and (b) minimum term of imprisonment should not be fixed at or less than two thirds of the primary sentence of the Court. The Court had also quoted ***Singh*** in relation to the Sentencing and Penalties Decree to the effect that the wording in section 18(1) and 18(2) is not suggestive that the intention of the llegislature in enacting that provision had rehabilitation of offenders in mind but it is deterrence and retribution that Parliament appears to have intended. The Supreme Court had also quoted **The Queen v. Radich** NZLR 1954 p.86 as follows and finally held that the appellant had not been deprived of rehabilitation by the non-parole period of 09 years out of the head sentence of 13 years.

'On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct, of the individual offender, and the effect of the sentence on this, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.'

[103] Thus, it is clear that the decision in ***Turogo*** does not in any way diminish the impact of ***Tora*** and ***Raogo*** as to what matters should be considered when fixing the non-parole period or ***Turogo*** should not be taken to state that rehabilitation of the offender should not be considered in the matter of fixing the non-parole period. Therefore, a trial judge dealing with fixing a non-parole period should give due regard to the principles of ***Tora*** and ***Raogo*** which were adopted in ***Bogidrau*** and ***Turogo.***

[104] The Supreme Court in **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22 once again dealt with the issue of fixing a non-parole period and the grant of remission. The following propositions of law *inter alia* can be deduced from the decision.

(i) *Judicial officers need to justify the imposition of non-parole periods close to the head sentence, or indeed for the decision not to impose one at all, for section 18(1) speaks in terms of "must fix a period..." (per Gates,J)*

(ii) *fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. (per Lokur,J)*

(iii) *The power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where it is absolutely necessary to do so and when that power is exercised it must be preceded by a hearing and supported by reasons. (per Lokur,J)*

(iv) *The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur,J)*

[105] In **Rarasea v State** AAU0118 of 2014: 4 October 2018 [2018] FJCA 156 a concurrent judgment of the Court of Appeal *inter alia* had accepted that reasons should be given why a particular non-parole period is selected.

> *[57] ……. a sentencing court must always fix non-parole period if the sentence falls within 02 years and life imprisonment and the discretion lies only in deciding upon the length of that period.*

*[58] However, **…. the sentencing judge should give reasons as to why he or she selects a particular non-parole period i.e. the length of the non-parole period**. The discretion under section 18(1) is not on whether a non-parole period should be imposed or not but on the length of it. The Court of Appeal in **Rohit Prasad v State** AAU 0010 of 2014: 04 October 2018 dealt with the requirement of sentencing judges giving reasons why they select a particular non-parole period, particularly when it is too close to the head sentence. Moreover, when a particular non-parole period is fixed the sentencing judge should have regard to section 4(1) and (2) of the Sentencing and Penalties Act, in particular 4(1) (a) , (c) and (d) as held by the Court of Appeal in **Tora v State**AAU0063 of 2011:27 February 2015 [2015] FJCA 20. Thus, section 4 of the Sentencing and Penalties Act comes into equation not only in deciding the head sentence but also in fixing the non-parole period.*

[59] Similarly, when a sentencing judge decides to act under section 18(2) and decline to impose a non-parole period he or she must give reasons for exercising the discretion in favour of the accused vis-à-vis the nature of the offence and the past history of the offender. The difference is that when the sentencing court acts under section 18(2) it has to consider the nature of the offence and the past history of the offender in addition to the matters under section 4 of the Sentencing and Penalties Act in fixing the head sentence without a non-parole period.'

[106] As against **Timo v State** (supra) we have **Kean v State** (supra) where the Supreme Court said the *'Unless the nature of the offence or the past history of the offender made the fixing of a non-parole period inappropriate, **the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender is not eligible to be released on parole.'*** and **Wise v State** (supra) where the Supreme Court held that ' ***the sentencing court must fix a non-parole period – section 18(1) of the Sentencing and Penalties Decree***. In other words according to ***Keen*** and ***Wise*** no discretion is left with the sentencing judge whether to fix a non-parole period or not under section 18(1) of the Sentencing and Penalties Act 2009.

[107] Though **Kean v State** (supra) has been referred to in **Timo v State** (supra) by the Supreme Court on the current practice on remission by the Commissioner, the above affirmative pronouncement of the mandatory nature of section 18(1) of the Sentencing and Penalties Act 2009 in ***Kean*** and ***Wise*** have not been dealt with or overruled.

[108] When section 18(1) of the Sentencing and Penalties Act 2009 was promulgated the legislature was aware or should be deemed or ought to have been aware of section 27 and 28 of the Corrections Services Act regarding remission and the powers of the Parole

Board under section 49 and therefore, compelling the court by the use of the words *'..must fix…'* to fix a period non-parole under section 18(1) despite the said provisions in the Corrections Services Act was deliberate and intended by the legislature. As Gates, J states in paragraph 11 in ***Timo,*** *section* 18(1) speaks of *'..must fix a period..'* and therefore, empowered the court to impose a non-parole period when the sentence is 02 or more years which is not merely directory but mandatory. Section 18(2) makes this intention clearer by the use of the words *'the court may decline'* leaving discretion with sentencing court.

[109] Therefore, as Gates J says paragraph 08 in ***Timo*** the written law as it has been passed by Parliament should be applied and in the absence of any ambiguity of the legislative intention, section 18(1), as it is, should be given effect to. It would not be an encroachment of the powers of the Commissioner or the Parole Board as the Parliament had intended the powers vested in them to be exercised subject to the powers vested in court under section 18 of the Sentencing and Penalties Act 2009. Nor would it amount to a breach of the Constitution. The Parliament has vested court with the power to fix the non-parole period because as held in ***Natini*** the sentencing judge is in the best position, having gone through the trial or the sentencing procedure and being armed with all the circumstances including the propensities of the accused, to decide on the matter as opposed to the Commissioner (there being no Parole Board at present) who would by and large consider only the 'good behavior' of the prisoner during the time of incarceration.

[110] In the circumstances, to insist that power under section 18(1) Sentencing and Penalties Act 2009 should be exercised by the Courts only in exceptional cases and circumstances and where it is absolutely necessary to do so and the trial judge should give reasons for acting under section 18(1) would be to negate the intention of the Parliament and to introduce new elements into the section which is plain and simple. I think it should be left to the Parliament to change the scope and operation of section 18(1) Sentencing and Penalties Act 2009, if it so desires.

[111] Therefore, after considering the previous decisions of the Supreme Court in ***Kean*** and ***Wise*** , the concurrent judgment in the Court of Appeal in ***Rarasea*** , the Court of Appeal decision in **Prasad v State** AAU0010 of 2014: 4 October 2018 [2018] FJCA 170 and for the reasons given above, I would prefer to follow ***Kean*** and ***Wise*** as opposed to ***Tiome*** in

this regard and do not find any error of law in the trial judge's decision to impose a non-parole period by operation of section 18(1) Sentencing and Penalties Act 2009 and for not giving reasons for doing so.

[112] The Court of Appeal in **Prasad v State** (supra) took the view that when the judge acts under section 18(2) reasons should be given why he does so as it involves an exercise of discretion and reasons should be given when the non-parole period is fixed very close to the head sentence. In ***Prasad*** the Court of Appeal said

> *'…… a trial judge exercising discretionary power under section 18(2) of the Sentencing and Penalties Decree 2009 should ordinarily give reasons for the decision, particularly when non-parole period is fixed very close to the head sentence so as to almost negate the aspect of rehabilitation of an accused in the society. Nevertheless, I would not hesitate to admit that there may be cases where the decision to fix the non-parole period close to the head sentence is fully justified on the facts and circumstances of the case.'*

[113] I shall now deal with the complaint of the non-parole period of 16 years being too close to the head sentence having the effect of denying or discouraging the possibility of rehabilitation, being inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20.

[114] The Court of Appeal guidelines in ***Tora*** and ***Raogo*** affirmed in **Bogidrau** by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.

[115] There is no breach of the third consideration (***Raogo)*** adverted to above in the non-parole period fixed in this case. However, it does not appear from the sentencing decision dated 11 July 2014 that the trial Judge had given consideration to the first and second aspects above stated as laid down in ***Tora*** and affirmed in ***Bogidrau***. Neither has the trial Judge given reasons even with an economy of words as to why he though it fit to fix the non-parole period so close to the head sentence.

[116] However, if this Court is to send back all appeals to the High Court to go through a hearing regarding fixing of non-parole periods only on the basis that such a hearing had not been given, it will lead to unnecessary delays to the detriment of the appellants themselves and chaos in case management as High Courts would be flooded with such cases. What is more pragmatic for this court is to examine all the material before it including sentencing submissions and decide whether (i) the period of non-parole and (ii) its proximity to the head sentence, is justified in the light of ***Bogidrau*** guidelines (incorporating ***Tora*** and ***Raogo)*** In doing so, in my view, this Court could act under section 23(3) of the Court of Appeal Act.

[117] What the trial judges should do in the future is to invite the parties to address court either orally or by way of written submissions on the matter of non-parole period as well (in addition to the usual matters on the length of the sentence, aggravating and mitigating circumstances, period of remand etc.) under section 18(1) of the sentencing and Penalties Act or as to why the judge should act under section 18(2) of the sentencing and Penalties Act, as part of the sentencing procedure and mitigation of sentence followed by brief reasons on the length of the non-parole period and its proximity to the head sentence.

[118] Accordingly, I have examined all the material available and my observations on the sentence and the non-parole period are given later in the judgment.

> ***'The head sentence of 17 years for the rape conviction was excessive on account of the sentencing Judge considering irrelevant matters'.***

[119] In any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years (see **Kasim v State** AAU0021j of 93s: 27 May 1994 [1994] FJCA 25) and the higher end has been taken consistently to be 15 years (**State v Naicker** - Sentence [2015] FJHC 537; HAC279.2013 (15 July 2015), **State v Kumar** - Sentence [2019] FJHC 594; HAC377.2016 (17 June 2019), **State v Caucau** - Sentence [2017] FJHC 518; HAC107.2013 (14 July 2017), **State v Vatuorooro** - Sentence [2017] FJHC 564; HAC50.2017 (28 July 2017), **State v Suguta** - Sentence [2017] FJHC 824; HAC100.2014 (2 November 2017), **Bera Yalimaiwai v The State,** Criminal Appeal Case No. AAU 0033 of 2003, **Navuniani Koroi v The State,** Criminal Appeal Case No. AAU 0037 of 2002, **Viliame Tamani v The State,** Criminal Appeal Case No. AAU 0025 OF 2003, **The State v Bijendra,** Criminal Case No. HAC 127 of 2011).

[120] In the sentencing decision the trial Judge has arrived at the sentence of 17 years as follows:

> *'7. 'In this case, the aggravating factors, were as follows:*
> *(i) When you offended against the complainant, you basically tortured her, by rudely awakening her from her sleep, put a kitchen knife to her neck, dragged her to her sitting room, and pinned her body to the floor by strangling her neck. Then you demanded money, went through her apartment, as if it was yours, and stole her properties, as mentioned in Count No. 2. You had no regard whatsoever to her property rights.*
> *(ii) You then proceeded to force yourself on her sexually. While doing the same, you were still holding a kitchen knife to her neck. You had no regard to the security of her person. Then you proceed to rape her. This was her home and castle, but you choose to disregard that, and deliberately invaded her privacy. She asked you to leave her alone, and go. But you choose to rape her again, and commit further indecencies on her. You were very cruel to her, and you deliberately disregarded her right to be free from any form of violence, even in her own home.*
> *(iii) Your above actions showed the coward that you are. You deliberately preyed on the vulnerable and the defenceless, in our community. You showed no mercy to the complainant while offending against her. You deliberately took what was not yours. You had no regard to the complainant, as a human being. You have caused the complainant much miseries and financial loss. She had to pick up her life, and move on. You will have to pay for your misdeeds with the loss of your liberty. I hope you will not complain, because your sentence will meet the injustices you have caused her.*
>
> *8. The mitigating factors are as follows:*
> *(i) You are 23 years old, single with no children;*
> *(ii) You have been remanded in custody from 26 June 2012 to 8 November 2013, a period of approximately 1 year 5 months.*
>
> *9. I start with the more serious offence of "rape" (Count No. 3). I start with a sentence of 15 years imprisonment. For the aggravating factors, I add 4 years imprisonment, making a total of 19 years imprisonment. For being remanded in custody for 1 year 5 months, I deduct the same from 19 years, leaving a balance of 17 years 7 months imprisonment. For the other mitigating factor, I deduct 7 months, leaving a balance of 17 years imprisonment. For raping the complainant, I sentence you to 17 years imprisonment.'*

[121] It appears that the High Court Judge has started at the highest point of 15 years and considered aggravating factors for all three counts together in adding 04 years and in the process counted the elements of the offences of aggravated burglary and theft as aggravating factors for adding 04 years for the offence of rape. Further, some aggravating factors have been repeated possibly amounting to double counting. There

is no evidence that the trial Judge has given due consideration to the ***Bogidrau*** guidelines and the provisions in section 4 of the Sentencing and Penalties Act.

[122] In **Koroivuki v State** AAU0018 of 2010: 5 March 2013 [2013] FJCA 15 the Court of Appeal said:

> *'[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.*
>
> *'[28] In the present case, the trial judge picked his starting point based on **Bavesi** category reserved for the most serious cases of offending involving considerable degree of sophistication. No reasons were given as to why the trial judge considered the offending in the present case to be the most serious case of offence involving considerable degree of sophistication. The lack of reasoning leads this Court to conclude that the trial judge erred in picking 5 years as his starting point.'*

[123] The trial Judge had not stated why he picked the starting point at the highest tariff point. Neither had he explained why the head sentence fell outside the tariff for adult rape. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors;

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

(Vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936) 55 CLR 499 as adopted in **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21).

[124] I think that there is reason for this Court to intervene in the matter of sentence on account of both grounds of appeal against sentence. The learned trial Judge has erred in the matter of sentence and in fixing the length of the non-parole period. Since both complaints regarding the appellant's sentence have been sustained, in my judgment, it

could be said that the appellant did not receive a just punishment in all the circumstances as required by section 4(1) (a) of the Sentencing and Penalties Decree.

[125] Therefore, for the reasons given, the appeal against sentence should be allowed. I am of the view that this is an appropriate case where the provisions of section 23(3) of the Court of Appeal should be invoked.

[126] However, I remind myself of the strong sentiments expressed by many a decision (for example see ***Kasim***, ***Drotini***, ***Raj***, **The State of Punjab vs Gurmit Singh & others** 1996 AIR 1393, 1996 SCC (2) 384, **Lokesh Mishra v. State of NCT Delhi** CRL. A. 768/2010 decided on 12 March 2014 by the High Court of Delhi, **Matasavui v State** Criminal Appeal No.AAU0036 of 2013: 30 September 2016 [2016] FJCA 118) on ever increasing surge in sexual crimes against children, juveniles, teenagers and adults of both sexes.

[127] I have examined all the material before Court and take the view that the head sentence should be very substantial. So should the non-parole period be. However, the period of non-parole (i) should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation (ii) nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent and it should not be at or less than two thirds of the head sentence in the light of ***Bogidrau*** guidelines (incorporating ***Tora*** and ***Raogo)***.

[128] Acting under section 23(3) of the Court of Appeal Act I hold that the sentence of 17 years imposed by the trial judge should be quashed. In lieu thereof, the appellant should be sentenced to 15 years imprisonment with a non-parole period of 13 years, effective from 11 July 2014.

[129] Therefore, I would conclude (i) the appeal against conviction should stand dismissed (ii) extension of time on three new grounds of appeal is refused (iii) application for fresh evidence is also refused (iv) the appeal against sentences is allowed.

Fernando, JA

[130] I agree that the appeal on conviction be dismissed and the appeal on sentence be allowed and the sentence recommended by Prematilaka, J be substituted.

Nawana, JA

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

The Orders of the Court are:

1. *Appeal on conviction is dismissed.*
2. *Enlargement of time is refused on all new grounds of appeal against conviction.*
3. *Leave to appeal is refused on all new grounds of appeal against conviction.*
4. *Application to lead fresh evidence is refused.*
5. *Appeal on sentence is allowed.*
6. *The sentence of 17 years with a non-parole period of 16 years imposed by the trial judge is quashed and 15 years imprisonment with a non-parole period of 13 years is imposed on the appellant.*
7. *Sentence 15 years imprisonment with a non-parole period of 13 years to run from 11 July 2014.*

.....
Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice A. Fernando
JUSTICE OF APPEAL

.....
Hon. Justice P. Nawana
JUSTICE OF APPEAL