IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0004 OF 2011
[High Court Criminal Case No. HAC 93 of 2009]

BETWEEN	:	**SAIRUSI NASILA**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Gamalath, JA** **Prematilaka, JA** **Bandara, JA**
Counsel	:	**Mr. Fesaitu. M for the Appellant** **Mr. Babitu. S for the Respondent**
Date of Hearing	:	**24 May 2019**
Date of Judgment	:	**06 June 2019**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Prematilaka, JA and I agree with its reasoning and the conclusions.

Prematilaka, JA

[2] This appeal arises from the conviction of the appellant on one count of abduction in order to subject a person to unnatural lust contrary to section 252 of the Penal Code and the other count of murder contrary to section 199 and 200 of the Penal Code.

[3] The Amended Information dated 18 November 2010 alleged under the first count that the appellant on 11 September 2009 at Nadi in the Western Division had abducted Unise Tareguci in order to subject her to his unnatural lust and under the second count that he murdered Unise Tareguci in the same transaction. After trial, on 19 November 2010 the appellant had been convicted by the trial judge upon unanimous opinions of the assessors and sentenced to 10 years imprisonment on the first count to run concurrently with the life imprisonment with a minimum term of 25 years imprisonment on the second count.

[4] The appellant had dispatched an 'application of appeal' which had reached the registry on 14 January 2011 (late by 27 days) against the conviction and sentence supplemented by written submissions received by the registry on 23 February 2011. The single Judge of Appeal, before whom the appellant had appeared in person, had excused the delay as being reasonable on the strength of **Jullien Miller v the State** (2007) AAU 0076 and granted enlargement of time to appeal without going through the usual test for extension of time for belated applications to appeal. On the face of the said appeal papers before court, altogether 05 grounds of appeal had been urged against the conviction and two against the sentence. On 26 June 2013 the single Judge had refused leave in respect of all grounds of appeal against the conviction and the sentence.

[5] The appellant had personally sought to renew his application for leave to appeal by way of a letter dated 15 August 2016 pursuant to section 35(3) of the Court of Appeal Act. Thereafter, he had obtained legal assistance from the Legal Aid Commission (LAC) and filed an 'amended renewal application' for leave to appeal through the LAC against the conviction and sentence on 22 May 2019, which was the first date of hearing of the appeal before the full court.

[6] The said *'Amended Renewal Notice – Leave to Appeal Against Conviction and Sentence'* filed by the LAC admittedly contains two completely new grounds of appeal against the conviction and one ground of appeal against the sentence unsuccessfully urged before the single Judge. Though couched as an application under section 35(3) of the Court of Appeal Act, it is clear that the two grounds of appeal now being urged by the LAC against the conviction cannot be regarded as renewed grounds as they were never urged before the single Judge at the leave stage. Only the sole ground of appeal against sentence could be legitimately considered as a renewed ground before the full court.

[7] The respondent in its written submissions has objected to the new grounds of appeal against the conviction being entertained at this stage. The respondent argues that whether the appellant was unrepresented or not should not be considered as a basis for allowing new grounds of appeal at the hearing of the appeal. This argument is not without logic. State relies on the decision in **Rokete v State** AAU0009 of 2014: 7 March 2019 of [2019] FJCA 49 where the Court of Appeal reiterated the observations of the Supreme Court in **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 where it was held

> *'82.It is improper that litigants be allowed to argue their cases on piece meal 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.*
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> *83.The Courts 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 Courts resources are going to be shamefully wasted*

[8] The Court of Appeal then remarked in ***Rokete***

> *'[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.'*

[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.

[10] It is the position of the LAC that the appellant was unrepresented at the leave stage and it impliedly argues that therefore he had no legal assistance to draft or urge proper grounds of appeal. Therefore, LAC's argument appears to be that once such legal advice is available the appellant should be heard on grounds of appeal drafted by his pleader even if they are totally new. This argument too cannot be rejected as being without any merit. The LAC on behalf of the appellant relies on the case of **Rokodreu v State** AAU0139 of 2014: 29 November 2018 [2018] FJCA 209 where the Court of Appeal held that Rule 37 of the Court of Appeal Act on the *'Amendment of notice of appeal'* would not come to the rescue of an appellant when totally new grounds are sought to be urged before the full court but still entertained those new grounds of appeal *'to ensure that no miscarriage of justice would occur'*.

[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.

[15] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **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.

[16] 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 emphasised in* ***Ratnam v Cumarasamy*** *[1964] 3 All ER 933 at 935 at 935:*
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> *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.*

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

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(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?*

[18] 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.'*

[19] I shall now consider each of the above factors.

Reasons for the failure to file within time

[20] There is no affidavit filed by the appellant explaining as to why the fresh grounds of appeal were not taken up from 19 November 2010 to 22 May 2019. The appellant was represented by his counsel till the end of the trail. The fact that the appellant appeared in person at the leave hearing alone is not an acceptable explanation for the delay, for it

may have been his decision to engage in subsequent legal proceedings by himself after his conviction and sentence at the trial court. In that case the appellant cannot complain that he had no legal advice or could not obtain such legal assistance to formulate grounds of appeal. Thus, no reasons are before this court for the long delay of 08 ½ years.

The length of the delay

[21] The two new grounds of appeal against conviction are late by about 8 ½ 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?

[22] The threshold that an appellant has to reach under this heading is higher than that of leave to appeal. The Court of Appeal in recent times has raised the bar even in timely leave to appeal applications by applying the test of 'reasonable prospect of success' to identify whether an arguable ground of appeal exists (see **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.

[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.

[24] The test of 'real prospect of success' would help achieve the criteria for enlargement of time as set out by 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.'*

[25] Otherwise, belated and unmeritorious appeals would consume the limited resources of the appellate court at the expense of timely and meritorious appeals which have successfully passed the threshold for leave to appeal and in such cases some of the appellants may be forced to serve the full sentence before their appeals finally reach the full court, as the roll of the court may already be clogged with underserving cases.

New grounds of appeal against conviction

[26] The new grounds of appeal against the conviction are as follows:

> *'(1) The learned trial judge erred in law and in fact by not adequately directing the assessors on how to approach the confession contained in the appellant's record of caution and charge interview statements.*
>
> *(2) The conviction for murder is not supported by the totality of the evidence.*

Prosecution evidence in brief

[27] At about 7.00 p.m. on the 11 September 2009 at Nakorokula village near Nadi, the appellant had taken away the child victim, Unise from her family compound. The appellant had been a friend of her family and a frequent visitor to that family's home and to that of her grandfather. Unise was 02 years and 11 months old at the time and the appellant had told the Police that he had *'always admired her when she was naked'*. He had also confessed to the Police that he had taken her that night because he wanted to have sex with her. While carrying her, the appellant had fondled her genitalia. When the appellant had got the victim home at Bole, he had tied her hands and touched her private parts. After about 20 minutes, he had carried the victim towards the pine forest where he had taped her mouth with masking tape and hidden her for some time before touching her genitalia again. Then the appellant had seen torch lights and heard the victim's grandfather calling her name and he had tried to cover her mouth by hand as the cellotape

was a small one so that she couldn't cry out. Thereafter, the appellant had carried her to the mangrove and then to the tramline and continued the journey following the tramline. She had started crying on the way whenever the appellant fondled her and touched her private parts and he had attempted to close her mouth but she had kept on crying. The appellant had punched her in the head, in an effort to keep her quiet when he heard others calling her name. He had hidden the victim at Waica point near the tramline in a fishing boat before being taken to Sariyawa. Upon reaching Sariyawa the appellant untied her hands, lay her down, took her T-shirt and covered her nose and mouth with it to stop her breathing. After struggling for some time, the victim had stopped breathing and the appellant knew that she had died. The appellant had said that he did this because he wanted to have sexual intercourse with her without anybody knowing what he did. Thereafter, the appellant had carried the victim's dead body to a place called Toveriki and removed her pants and tried to insert his penis into her private parts. After some time he had masturbated till he ejaculated and spread sperms on the victim's genitalia. Thereafter, he had carried and thrown the dead body down a slope and covered it with her pants and grass. This was about 3 o'clock in the morning. He had thrown the victim's T-shirt into a river near the tramline. The appellant had gone back home to sleep around 5.00 a.m. He had been arrested on the next day by Police and had confessed in the police vehicle and led the police party to where victim's body was. He had made a full confession in a cautioned interview and in an answer to the formal charge he had admitted putting clothes on her face until she died because he *'wanted to fxxx her'*.

[28] Post Mortem Examination Report of the victim had been part of the agreed facts. The medical evidence of Dr. Ponnu Swany had revealed that there had been swelling with blood on the front of the skull and on the right side of the head of the victim which could have been caused before death by a blunt object consistent with punch on the head. Thoracic cavity in the windpipe had contained copious amounts of froth, meaning that the victim had been asphyxiated. Cause of death had been due to suffocation which is obstruction of air passage resulting in no oxygenation of the blood. Abdominal cavity at vagina hymen had been perforated and swelling with blood had also been seen in the vulva area which, according the doctor is not normal.

[29] According to the victim's mother, Laisani Ena when she left her daughter outside her father-in-law's (victim's grandparent) home, which was just a few meters away, on the porch between 6.00 p.m. to 7.00 p.m. for the evening devotion session, the appellant was the only person seen in the close vicinity. She had heard the appellant calling the victim and telling that her grandfather was still having a shower. A little later the appellant had shouted from outside the house to Laisani who was breastfeeding the younger child inside her house that he was going to the village. The victim's grandfather, Timoci Narumasa had sent his wife Elina Marama to pick up the victim from home for the devotion. When Elina inquired from Laisani, she had told Elina that the daughter had gone to their house. When Elina went back and informed this to Timoci, all of them started looking for the victim. The search had continued throughout whole night till morning but the victim could not be traced. When the police brought the appellant onto the road in the morning Timoci had attempted to punch him but it had not landed on the appellant's face. But, both the police officer and the appellant had fallen on the gravel road due to the scuffle.

[30] PC Jesoni had testified that when the appellant saw the police party, he had wanted to run away but they managed to catch him. Timoci had tried to assault the appellant but the witness had prevented it, and both he and the appellant had ended up falling onto lose gravel on the ground. The witness had handed over the appellant to Inspector Apete and Sergeant Esira. Both of them had spoken to having seen the attempted assault by Timoci on the appellant and he and PC Jesoni falling onto the gravel road.

[31] Sergeant Esira Dokoni has stated that after they loaded the appellant into the vehicle and were on their way to Nawai police post before getting to Savusavu School, the appellant suddenly started crying in the vehicle. The witness had parked the vehicle on the side of the road and allowed him to speak and asked him where the victim was as the appellant was the only person last seen with her. Then, the appellant had narrated the whole scenario from the point where he had picked up the victim to the place where he had dumped her dead body.

[32] Inspector Apete also had testified that until they reached Savusavu the appellant had denied any knowledge of the victim going missing but at Savusavu he had started to cry and admitted having killed the girl and thrown her body into the bush at Tokoriki. After the appellant broke down the witness had cautioned him before he led the police party on the same route to the site of the body which he had undertaken the previous night along with the victim, from the beginning to the end of the journey.

[33] Both Sergeant Esira and Inspector Apete had testified that the appellant had taken them along the route used by him to take the victim after the initial abduction to where he disposed of it and it had been a 10 km walk from the beginning to the end. Finally the appellant had pointed out the place where he had dumped the body and after a search the police party had found it under the grass. Prior to that, the appellant had said that he killed the girl and he could show where the naked body was.

[34] DC Semi Cakaunibula had recorded the appellant's caution interview witnessed by Corporal Wayne Henry Tanu who was also the investigating officer. Corporal Wayne had said in evidence that he went to the scene where the naked body of the victim was lying and seen the child's pants also there. They had also found a cellotape and a copper wire with an orange colour coating while walking on the path. DC Timoci had recoded the appellant's charge statement.

[35] In the caution interview commenced at 7.00 p.m. on 13 September 2009 the appellant *inter alia* had said as follows

> *'Q76: What did you do when the time you reached Sariyawa?*
> *A: We reached the tree and I made her lay down and I laid beside her until she fell asleep and I take out her T-Shirt and tied her mouth and nose for her not to breath. She was struggling for some time till she never breath and I came to know that she is dead.*
> *Q77: What was the reason you did this to her?*
> *A: I just want to fxxx her as I didn't want anybody to know what I was doing.*

Q78: What else did you do?

A: I carry her from there to Toveriki and I take out her long pants and I tried to inject my penis to her private parts. After sometime then I masturbate till my sperm come out and I spread it on her private parts.

Q79: Then what did you do?

A: I carry her and throw her on the Para grass down the slope and also covered her with the Para grass and her pants.

Q88. What did you tell the police officers?

A: I did not tell anything, they just told me to sit in the police vehicle and whilst in the police vehicle, they again questioned me about Unise and I informed them what had happened and I showed them the place where I took Unise.

Q90: Can you show me all the places where you are talking about?

A: Yes.

[36] The caution interview had been suspended at 10.05 p.m. for the appellant to sleep and recommenced at 8.30 a.m. on 14 September. Thereafter, the caution interview had been once again suspended at 9.40 a.m. for the reconstruction of the scene and the appellant had taken the police party led by Corporal Wayne to the place where he had picked up the victim and from then onwards led them along the path he had carried the victim till they reached the place where the dead body was found. Along the way the appellant had pointed out his house at Bole, the road leading towards the pine forest and the mangrove farm which the appellant along with victim had crossed to get to the tramline. The police party had found a white cellotape near the bushes which was identified by the appellant at the place where the appellant and the victim had crossed the mangrove before reaching the tramline. Going further, the appellant had pointed out Waica Point where he and the victim spent some time and then led the police to the place where he had untied and made the victim lie down before covering the victim's nose and mouth with her T-Shirt till she died. The police party had found an orange colour twine copper insulated wire at this place. The appellant had then led the investigating party to the place where he had

sexually violated the victim's dead body and finally to the place where he had disposed of the body of the victim. He had correctly pointed out the place where the body was.

[37] In the charge statement made on 14 September the appellant had admitted the charge against him and said that *'I did it because I wanted to fxxx her when she cried I put a cloth on her mouth until she died'.*

[38] The appellant had been medically examined and psychiatrically assessed by Dr. Sish Ram Narayan, the consultant psychiatrist with 25 years of experience at St' Giles Hospital upon being referred to him by the Magistrate of Nadi on 24 September 2009. The doctor had observed him directly and secretly. His conclusion is that the appellant was mentally well enough to understand and knew what he was doing. Particular reference had been made to the organised manner in which the appellant had executed the crime, disposed of the body and led the police to the scene. According to the doctor the appellant had attempted to feign some abnormality when he knew that he was being observed but when secretly observed his behaviour had been normal. The doctor had found most of his claims to be untrue while others were normal. The trial judge in the sentencing order dated 19 November 2010 said as follows on this matter

> *'[8] You have been psychiatrically examined in St. Giles Hospital where the doctor found that despite a history of anti-social 'traits" and despite previous polysubstance abuse, you were well aware at the time of what you were doing and that you were sane enough to plead and stand trial. The doctor also said that in his opinion you were feigning psychotic symptoms. I happened to notice during trial that you attempted to behave abnormally and I have no doubt that this was a calculated cynical attempt to influence the Court. You gave evidence before me on a pre-trial matter and in your evidence you demonstrated careful planning of a defence, you understood completely what was asked of you and you were able to give a logical chronological narration of events of 11/12 September 2009. I accept the psychiatrist's opinion that you knew exactly what you were doing and although I do not profess to be a psychiatrist, I find that your behaviour during trial was manipulative, and deceitful.'*

Ground 01

[39] In the light of the above evidence led at the trial, I shall now examine the first grounds of appeal

> **'*The learned trial judge erred in law and in fact by not adequately directing the assessors on how to approach the confession contained in the appellant's record of caution and charge interview statements.'***

[40] The counsel for the appellant has elaborated this ground of appeal by referring to paragraph 23 of the summing up where the trail judge had allegedly not directed the assessors on the weight and probative value to be attached to the appellant's confessional statements and reliance is placed on the case of **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 where the Court of Appeal held *inter alia*

> *' 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.'*

[41] Paragraph 23 of the summing up is as follows

> *'However despite the lack of evidence, if you think the confessions might have been produced by assaults then you must disregard them and if you think they may have been fabricated, then again you will disregard them. However if you are sure that he did make these confessions, and that they were true then you may take them into account when coming to your opinions.'*

[42] However, as the Court of Appeal in ***Volau*** 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]) 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.

[43] Moreover, as the Supreme Court 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'.* The Supreme Court also said 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, that *' There is no incantation which must be read here. The required guidance need not be formulaic.'* The Supreme Court reiterated these remarks 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. The Supreme Court while disallowing the appeal stated in ***Tuilaselase*** 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....'*
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> Paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up as given below has not specifically referred 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".* '

[44] At the trial, the appellant had not taken up the position that he never made the confessional statements. On his behalf what had been suggested is that the police officers had punched him but all of them have consistently said that it was the grandfather of the victim who attempted to assault the appellant but was prevented by PC Jesoni but in the melee the police officer and the appellant had fallen on the gravel road. Thus, there was no need to address the assessors on the making of the confessional statements. The trial judge had addressed the assessors on the issues of voluntariness and truth of them. His statement in paragraph 23 ' .... *then you may take them into account when coming to*

your opinions.' is another way of addressing on the weight of the confessional statements and left the assessors to decide what weight to be attached. In addition at paragraph 03 of the summing up the trail judge has said

> *'The facts of this case are your responsibility. You will wish to take into account the arguments in the State's closing speech you heard yesterday afternoon but you are not bound to accept them. What counsel said to you is not evidence. Equally, if in the course of my review of the evidence I appear to express any views concerning facts, or emphasize a particular aspect of the evidence, do not adopt those views unless you agree with them and if I do not mention something which you think is important you should have regard to it and give it such* ***weight*** *as you think fit. When it comes to the facts of this case it is your judgment alone that counts.'*

[45] The trial judge in the judgment dated 19 November 2010 had directed himself in accordance with the summing up. Therefore, despite the alleged omission on the aspect of 'weight' in the summing up regarding the confessional statements, the real question is whether the assessors would have expressed different opinions on the evidence available and whether the trial Judge would have arrived at a different verdict in his judgment being the ultimate decider of facts and law and also on guilt or innocence of the appellant. He had fully believed the prosecution evidence and described the behavior of the appellant at the trial as 'manipulative and deceitful', in the sentencing order delivered on the same day as the judgment.

[46] 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 my view, having had the benefit of the entirety of evidence and a direction on voluntariness and truthfulness of the caution interview statement too, I am convinced that the assessors would not have expressed any other opinion due to lack of specific reference to 'weight'. I have no doubt that on the evidence led at the trial the case against the appellant has been proved beyond reasonable doubt. This is so with or without the confessional statements of the appellant. 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 is no need even to invoke the proviso to section 23 (1) of the Court of Appeal Act regarding the first ground of appeal.

[47] The counsel for the appellant has also argued based on **Chand v State** AAU0015 of 2012: 27 May 2016 [2016] FJCA 61 that the trial judge should have directed the assessors whether they thought that the remaining evidence was enough to prove charges against the appellant if they were to conclude that the caution statement taken at its best did not prove the elements of murder against the Appellant. This, once again, is outside the first ground of appeal.

[48] In *Chand* the evidence available to implicate the appellant sans the caution interview was very week and, perhaps not sufficient to uphold a conviction. It is in that context that the Court of Appeal made those observations regarding a further direction as demanded by the appellant in this case. However, in the instant case against the appellant there is enough circumstantial evidence even without his confessional statements [the first of which could have been led even under the rule of *res gestae* - *vide* **Nadim v. State** Criminal Appeal No. AAU 0080 OF 2011 decided on 02 October 2015; [2015] FJCA 130)] to prove the charges against him. Thus, not directing the assessors on the lines suggested in *Chand* has not caused any material prejudice to the appellant. In any event, the fact that the assessors had expressed opinions that the appellant was guilty of both counts shows that they had believed the prosecution evidence fully including his confessional statements and the absence of such a direction would not have had any impact on their decision. It would have been superfluous. Moreover, by the absence of that direction it is the prosecution that had been at a disadvantage and not the appellant.

[49] I may add a final word while I am still on this aspect of the matter. It does not appear that any re-directions had been sought on the alleged non-directions by the trial judge though the trial judge, probably due to an inadvertence, had not requested the counsel to do so. 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. The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial. The Supreme Court once again reiterated this position in

Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17. I think the counsel should not shy away from fulfilling this important duty even if there is no specific invitation from the trial judge at the end of the summing up. No trial judge would refuse a legitimate request for an appropriate re-direction.

[50] The counsel for the appellant has also sought to challenge the summing up on the basis that the trial judge had given examples from the caution interview to explain the elements of the offences on the amended information. This complaint contained only in the further submissions filed on 23 May 2019 (after the first date of hearing) and cannot be legitimately included under the first ground of appeal which concerns alleged inadequacy of directions on the assessors as to how to approach the confessional statements. The counsel for the appellant seems to have raised a newer ground of appeal within the first new ground of appeal. Enough has already been said of new grounds of appeal being raised for the first time before the full court. In this instance this unhealthy practice seems to have reached new heights. In **Laojindamanee v State** AAU0044 of 2013: 30 September 2016 [2016] FJCA 137 Gounder, JA said

> *'As I have said earlier in my judgment, this practice of raising grounds of appeal for the first time in the written submissions should not be encouraged. However, in the interests of justice, I have decided to consider the new grounds.'*

[51] Since the State, while objecting, had responded to this 'ground within ground' (while objecting) in its written submissions filed on 27 May 2019, I shall consider the merits of it purely in the interest of justice.

[52] The example given by the appellant to substantiate his allegation is paragraph 16, 17 and 19 of the summing up.

> *'If a person deliberately prevents another from breathing then that is an unlawful act..*
>
> *'.... but you might find that taping of her nose and mouth and or holding a shirt over her nose and mouth to prevent her crying out may have been the cause of the asphyxiation which killed her.'*

'So the prosecution must prove beyond reasonable doubt either that this accused intended to kill Unise or to cause her serious harm, or that by holding a shirt over her nose and mouth that death or serious harm would probably be caused.'

[53] The appellant's position is that the trial judge should not have referred to these examples to describe the elements of the charges against him in the summing up before the assessors were asked to consider the confessional statements.

[54] A similar complaint was made in **Chand v State** AAU112 of 2013: 30 November 2017 [2017] FJCA 139 where the Court of Appeal said

'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.'

[55] 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.

[56] Similarly, 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.'

[57] In **Yang Xieng Jiong v State** AAU0077 of 015: 7 March 2019 [2019] FJCA 17 the only item of evidence, upon which the prosecution case was founded was the caution interview that contained certain admissions attributable to the wrongful conduct of the appellant but the trial judge's examples went beyond the admissions that could have led

the assessors to infer culpability of the appellant and in that context 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. This, in my view, cannot be resorted to indiscriminately.'*
>
> *'..... In such a situation, I am of the view that the restructuring of the wrongful act with reference to specific act or acts of the appellant under the pretext of an illustration, which resembled the crime scene, could eliminate fairness, reasonableness and objectivity in the summing-up of the learned trial judge. Instead, the assessors were more likely to have been unreasonably prejudiced in the absence of any direct evidence independent of the confessional statement of the appellant. Furthermore, such a venture by the learned trial judge is, in my view, tainted with the inefficacy of bringing into the fore the same evidence, being the confessional statement in the caution interview, twice before the assessors: one in the form of caution interview itself; and, the other in the form of an illustration by the learned judge.'*

[58] The warning in ***Chand*** should be considered in the total factual matrix of the case and not in isolation. In the instant case all the examples resembling the allegation against the appellant given by the trial judge are borne out by the evidence in the case. Referring to them prior to directing the assessors on the confessional statement cannot be said to have caused any material prejudice. No worthy complaint could be made of the trial judge's examples and summing up in this regard.

[59] In **Silatolu v The State** Criminal Appeal No.AAU0024 of 2003S: 10 March 2006 [2006] FJCA 13 the Court of |Appeal said

> *'The question for this Court is whether, considered as a whole, the summing up so lacked fairness as to require an order for a fresh trial'.*

[60] Having examined the summing up in the light of the totality of evidence, I am not convinced at all that the examples given by the trial judge which form the basis of the appellant's complaint have resulted in a miscarriage of justice forcing this court to intervene.

[61] Therefore, the first ground of appeal has no merit. It is unlikely to succeed and has no real prospect of success.

Ground 2

The conviction for murder is not supported by the totality of the evidence.

[62] The appellant argues under this ground of appeal that there is insufficient evidence to hold that the appellant had malice afterthought.

[63] Section 199 (1) of the Penal Code states *'Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder'*. The punishment for murder is life imprisonment (*vide* section 200 of the Penal Code).

[64] Section 202 of the Penal Code defines malice afterthought as follows.

> *'Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.*

[65] The appellant argues that according to his caution interview the intention of taking the victim was to have sex with her and there is paucity of evidence his having entertained malice afterthought and therefore the conviction for murder is not supported by evidence.

[66] In my view, the evidence in the case completely militates against this argument. The following items of evidence coming out of the appellant himself are revealing.

> **'***I laid beside her until she fell asleep and I take out her T-Shirt and tied her mouth and nose for her not to breath. She was struggling for some time till she never breath and I came to know that she is dead.'* (vide caution interview)

'I did it because I wanted to fxxx her when she cried I put a cloth on her mouth until she died' (vide charge statement)

[67] A person is capable of breathing in and breathing out through the nose and the mouth and when both are blocked there can be only one result; namely the death of that person. Every person would know or ought to have known or should be presumed to know this simple fact of life. Every person is also presumed to intend or foresee the natural consequences of his actions. Thus, it is clear beyond any reasonable doubt that the appellant knew or ought to have known that the result of his act of tying the mouth and nose of the sleeping victim with her T-Shirt was her death. In fact it is clear that after suffocated the child, the appellant waited for her to die or expected her death to happen and then took the dead body some distance away in order to attempt to have sexual intercourse with the dead child. Failing to complete the sexual intercourse, he masturbated till ejaculation and rubbed his sperm over her vagina.

[68] This is clearly a case falling under section 202(b) of the Penal code. When section 202(b) applies it does not matter whether the appellant intended only to have sexual intercourse but not to cause the death of or to do grievous harm to the victim. His lust for sexual intercourse with the victim appears to be only the motive. Needless to say that motive is not an element or part of the offence murder. Whatever the motive is, the appellant's act of deliberately suffocating the victim could lead to one and only one inference that he had the knowledge that his act will probably cause the death of or grievous harm to the victim. Even if the appellant was indifferent as to whether death or grievous bodily harm would be caused or not to the victim, or even if he wished that death or grievous harm may not be caused to the victim, it makes no difference to his liability for murder.

[69] Therefore, the second ground of appeal has no merit. It is unlikely to succeed and has no real prospect of success.

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

[70] The respondent in this appeal is the State and it cannot be said that the State would be unfairly prejudiced as a result of an extension of time. However, in a purely hypothetical

scenario, in the case of a retrial a long delay such as 08 ½ years could mean that there is a possibility that some of the vital witnesses for the prosecution, particularly the police officers may not be available due to reasons such as oversees duty etc. which will hamper the conduct of the prosecution and unfairly prejudice the State.

[71] In the circumstances, I refuse to grant enlargement of time as far as the 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.

Ground 03 - against sentence

'The minimum term of 25 years imprisonment is excessive in the circumstances of the case'

[72] The ground of appeal against sentence is almost similar to one of the grounds urged before the single Judge and therefore has been properly renewed for leave to appeal before the full court. Therefore, the appellant should satisfy the appropriate test for leave to appeal with regard to the sole ground of appeal against sentence.

[73] In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court set out the guidelines to be followed for leave to appeal when a sentence is challenged in appeal. They are as follows

> *'[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** [1936] HCA 40; (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 at [2]. 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.*
>
> *[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in **Chirk King Yam v***

> ***The State*** *Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of* ***Kim Nam Bae's*** *case.'*

[74] In passing the sentences on the appellant the trial judge in his sentencing order dated 19 November 2010 had said as follows

> *'[9] I am by law mandated to pass a term of imprisonment on you for life for the offence of murder which I do. For the abduction which carries a maximum term of 10 years, I sentence you to ten years to be served concurrently.*
>
> *[10] In view of the foregoing with its myriad aggravating features, not the least being that the victim was 2 years 11 months,* ***I order you to serve a minimum term of 25 years without parole, in terms of section 18(1) of the Sentencing and Penalties Decree 2009.****'*

[75] Section 237 of Crimes Decree prescribes the penalty of mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before pardon may be considered for the offence of murder. Sentencing and Penalties Decree in section 18(1) stipulates that subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

[76] The complaint of the appellant is that the trial judge should have considered section 237 of the Crimes Decree instead of section 18(1) of the Sentencing and Penalties Decree on the basis of **Balekivuya v State** AAU0081 of 2011: 26 February 2016 [2016] FJCA 16 where the Court of Appeal held that specific sentence provision of section 237 of the Crimes Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Decree when the sentence is mandatory life imprisonment for murder. He has also argued on the strength of **Darshani v State** AAU0064 of 2014: 1 June 2018 [2018] FJCA 79 that the trial judge should have made reference to issues of

deterrence or rehabilitation in the sentencing order in fixing the minimum period to be served.

[77] The State on the other hand relies on **Tapoge v State** AAU121of 2013: 30 November 2017 [2017] FJCA 140 and **Tapoge v State** CAV022 of 2018 & CAV023 of 2017: 26 April 2018) [2018] FJSC 8 to justify the imposition of the minimum term of 25 years to be served by the appellant.

[78] However, in all four decisions aforesaid and relied on by both parties the appellants had been charged under the Crimes Decree (now Crimes Act) and sentenced according to the Sentencing and Penalties Decree (now Sentencing and Penalties Act). The offences alleged to have been committed by the appellant in this instance had been committed prior to the promulgation of the Crimes Decree and the Sentencing and Penalties Decree on 11 September 2009 and therefore he had been charged under the Penal Code and his sentence should be considered in the light of the legal provisions applicable at that time. In that respect the following provisions of law have to be considered.

[79] Section 392(1) and (2) of the Crimes Decree state that

> *'(1) Nothing in this Decree affects the validity of any court proceedings for an offence under the Penal Code which has been commenced or conducted prior to the commencement of this Decree.'*
>
> *(2) **When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court shall apply the penalties prescribed for that offence by the Penal Code**.'*

[80] Section 393(1) of the Crimes Decree state that

> *'for all purposes associated with the application of section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Decree, and for the purposes of the proceedings relating to such offences the Penal Code shall be deemed to be still in force.'*

[81] Section 60 of the Sentencing and Penalties Decree states

> *'Nothing in this Decree affects the validity of any sentence of any court made prior to the commencement of this Decree, and all such sentences shall be carried out in accordance with the laws applying at the time that they were made.*

[82] Section 61 of the Sentencing and Penalties Decree states

> *'61. — (1) A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree.*
>
> *(2) On the hearing of any appeal against a sentence imposed by a court prior to the commencement of this Decree, the court hearing the appeal may —*
>
> *(a) confirm the original sentence to apply in accordance with any law under which it was made at the trial of the offence; or*
>
> *(b) vary the original sentence and impose any sentence in accordance with this Decree.'*

[83] Section 33 of the Penal Code as it then stood stated that

> *'Whenever a sentence of imprisonment for life is imposed on any convicted person the judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve. (introduced by Act No. 28 of 1972.)'*

[84] However, in **Goundar v State** AAU0009 of 2006 & AAU0039 of 2006: 25 June 2007 [2007] FJCA 30 the Court of Appeal adverted to the amending law in 2003 and said as follows

> *'[24] However, we note that the judge sentenced in the following terms;*
>
> *"Accordingly you are each sentenced to imprisonment for life and with respect to each of you I recommend that you serve minimum terms of 15 years in jail."*
>
> *The terms of section 33 of the Penal Code permitted the judge, when ordering life imprisonment, to recommend the minimum period he considers the prisoner*

should serve. ***However, that power was strengthened by the Penal Code (Penalties) (Amendment) Act, No 7 of 2003 so the judge may now "fix the minimum period".***

[25] We quash the order recommending the minimum period and substitute an order that each shall serve a fixed minimum term of fifteen years.

[85] In **Yunus v State** CAV0008 of 2011:24 April 2013 [2013] FJSC 3, the Supreme Court considered section 33 of the Penal Code and section 2 of the Penal Code (Penalties) (Amendment) Act 2003 and held that

'[8] Section 33 of the Penal Code, as it stood in March 2000, at the time the offence was alleged to have been committed, read as follows:

Whenever a sentence of imprisonment for life is imposed on any convicted person, the judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve.

[9] The said provision was amended by section 2 of the Penal Code (Penalties) (Amendment) Act 2003 (hereinafter sometimes referred to as the "Amendment Act"). It is not in dispute that the Amendment Act was published in the Gazette on 6 June 2003, and came into force on that date.

[10] ***By Section 2 of the Amendment Act, section 33 of the Penal Code was repealed, and substituted with the following:-***
Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve.

[11] It will be noted that the significant difference between the two sections is that, under the former, the judge may 'recommend' the minimum period whereas, under the latter, the judge may 'fix' the period.'

[86] Since the appellant had committed the offences in September 2009 what was applicable was section 2 of the Penal Code (Penalties) (Amendment) Act, No 7 of 2003 which vested the trial judge with the discretion to 'fix' the minimum period which the court considers the appellant must serve as opposed to 'recommend' the minimum period to be served.

[87] Therefore, though section 200 of the Penal Code did not vest the trial judge with a judicial discretion to set a minimum term to be served before pardon may be considered for murder, section 2 of the Penal Code (Penalties) (Amendment) Act, No 7 of 2003 empowered the trial judge to do so.

[88] Thus, it appears that the trial judge had only erred in acting under section 18(1) of the Sentencing and Penalties Decree in ordering the appellant to serve a minimum term of 25 years without parole. However, it is only a technical error because the trial judge could have fixed the same 25 years as the minimum period the appellant must serve under section 2 of the Penal Code (Penalties) (Amendment) Act, No 7 of 2003 which was the law applicable at the time the offences were committed.

[89] Given that the appellant had acted in a totally unprovoked and senseless manner showing scant disregard for the preservation of human life driven only by unbridled lust for perverse sexual pleasure and also showed a total lack of remorse, he deserves deterrence in the form of a very substantial minimum period of incarceration. A survey of previous sentences over a long period of time shows that the courts had imposed minimum serving periods ranging from around 10 years to 25 years with exceptions at the lowest and highest ends, depending on the facts and the gravity of circumstances of each and every case in addition to the mandatory life sentence for murder. I cannot see anything wrong with the 25 years imprisonment as the minimum period the appellant must serve before pardon may be considered in the teeth of the horrific acts of the appellant that speak for themselves. They shock the conscience of any human being. He is clearly a danger to the society and must be kept in imprisonment for at least 25 years.

[90] Therefore, though not within the strict parameters set in *Naisua,* I would grant leave to appeal on the technical error of law stated above on the sole ground of appeal against sentence but for the reasons set out above dismiss the appeal on the sentence for want of merit.

[91] Further, acting under Section 61 of the Sentencing and Penalties Decree, I would confirm the original sentence of life imprisonment to apply in accordance with section 200 of the Penal Code and 25 years of imprisonment as the minimum period the appellant must serve under section 02 of the Penal Code (Penalties) (Amendment) Act, No 7 of 2003. These two provisions were the law applicable at the time the appellant committed the offences.

Bandara, JA

[92] I concur with the judgment of Prematilaka, JA and agree with the reasons given and orders proposed.

The Orders of the Court are:

1. Enlargement of time is refused on the 01st and 02nd grounds of appeal against conviction.
2. Leave to appeal is refused on the 01st and 02nd grounds of appeal against conviction.
3. Leave to appeal is granted on the 03rd ground of appeal against sentence.
4. Appeal against sentence is dismissed.
5. Acting under section 61 of the Sentencing and Penalties Decree the original sentence of life imprisonment on the appellant is confirmed as mandated by section 200 of the Penal Code and the appellant must serve 25 years of imprisonment as the minimum period under section 2 of the Penal Code (Penalties) (Amendment) Act, No 7 of 2003 from the date of the original sentence (*i.e.* 19 November 2010).

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice W. Bandara
JUSTICE OF APPEAL