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

CRIMINAL APPEAL NO. AAU 61 OF 2015
(High Court Criminal Case: HAC 68 of 2014)

BETWEEN : **NEMANI RAQIO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsels : **Mr S Waqainabete for the Appellant**
Ms E Rice for the Respondent

Date of Hearing : **13 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I agree.

Prematilaka JA

[2] I have read in draft the judgment of Nawana, JA, and agree with the reasons and orders proposed.

Nawana JA

Introduction

[3] This is an appeal by the appellant against his conviction by the High Court of Labasa, Fiji Islands, upon charges of rape; attempted rape; and, indecent assault, punishable under the Penal Code, Cap. 17; and, the Crimes Act, 2009.

[4] The offences were alleged to have been committed by the appellant on two young female complainants. The names of the complainant-victims are suppressed to maintain their anonymity. They will be referred to as SK and MN for referential purposes of this judgment.

[5] The appellant was within age range of 65-70 years during the time span when the alleged offences were committed. SK, the victim of the offences of rape and attempted rape, as referred to in counts (1)-(4), was thirteen to eighteen years of age during the time when the alleged offences were committed on her. MN, the victim of the offence of indecent assault, as referred to in count (5), was thirteen years of age at the time of the alleged offence. The two victims, who were cousins, belonged to the same family circle of which the appellant stood as a grandfather in an extended family relationship.

Charges

[6] The charges, as presented by the Director of Public Prosecutions (DPP) on the basis of five counts on the information dated 28 November 2014, were as follows:

First Count

Statement of Offence

RAPE : Contrary to section 149 and 150 of the Penal Code Cap 1

Particulars of Offence

NEMANI RAQIO between 1st day of January 2009 and 31st day of December 2009 at Vuniwai Village Saqani in the Northern Division had unlawful carnal knowledge of **SK** without **SK's** consent.

Second Count

Statement of Offence

ATTEMPTED RAPE: Contrary to Section 208 of the Crimes Decree 44 of 2009

Particulars of Offence

NEMANI RAQIO between 1st day of January 2011 and 31st day of December 2011 at Vuniwai Village Saqani in the Northern Division attempted to have carnal knowledge of **SK** without Sera Kula's consent.

Third Count

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

NEMANI RAQIO between 1st day of November 2013 and 30th day of November 20103 at Vuniwai Village Saqani in the Northern Division had carnal knowledge of **SK** without **SK's** consent.

Fourth Count

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) of the Crimes Decree 44 of 2009.

Particulars of Offence

NEMANI RAQIO between 1st of November 2013 and 31st day of December 2013 at Vuniwai Village Saqani in the Northern Division penetrated the vagina of **SK** with his fingers without **SK's** consent.

Fifth Count

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Decree 44 of 2009.

Particulars of Offence

NEMANI RAQIO between 1st day of December 2013 and 31st day of December 2013 at Vuniwai Village Saqani in the Northern Division unlawfully and indecently assaulted **MN**.

Trial

[7] The trial against the appellant on the five charges, as set-out above, proceeded upon the pleas of not guilty being recorded in respect of the charge in each count. SK, MN and their aunt gave evidence for the prosecution in relation to each charge, as applicable.

[8] As borne-out by the transcript of proceedings, there was no contest on the issue of calling for the defence from the appellant in respect of charges in count Nos (1), (3)-(5) on the information, as conceded by the learned counsel for the defence. However, the learned judge, after hearing submissions of the learned counsel for the prosecution on the case concerning the charge of attempted rape in count (2), decided to call for the defence from the appellant in respect of all counts including count (2).

[9] The appellant testified on his own behalf and called no other evidence in defence.

Evidence of the complainants

[10] Evidence, as adduced by the complainant-SK in relation to counts (1)-(4), revealed that she was living in Vuniwai village in 2009 when she was studying in Form Three. SK's house and the appellant's house were situated in that village close to each other and SK used to visit the appellant's house. SK testified further as follows:

(i) On an unspecified day in 2009, when SK was sleeping inside the appellant's house, the appellant lifted her skirt and penetrated her vagina with his penis;

(ii) On another unspecified day in 2011, when SK went to fetch some salt at her mother's request, the appellant grabbed her inside the house and tried to take off her skirt. SK was able to escape as the wife of the appellant was heard coming home and she left the house of the appellant after collecting salt.

(iii) SK recalled another incident of an unspecified day in 2013 where the appellant's wife, while watching a movie at SK's house, wanted her to get a jacket from the appellant's house. As SK entered into the house, the appellant took off her underwear and penetrated the vagina with his finger; and,

(iv) SK, recalling another incident in 2013 on an unspecified day, said that she was grabbed inside the house and put on a bed by the appellant inside the appellant's house and penetrated her vagina with the appellant's penis.

[11] SK identified the appellant as the person who committed the above acts on her. She said that she did not complain against any of these incidents until 2014 and gave no specific reasons for not complaining within the long period of five years. However, in answering re-examination, she said that she was frightened and scared of the appellant.

[12] Cross-examination, though covered all four incidents, confirmed only what SK told court in direct examination. It did not displace the assertions of SK as regards the acts alleged against the appellant. It also did not attack the credibility of SK based on the long delay in bringing the matter before court in the absence of any evidence on recent complaints.

[13] MN, in relation to the charge of indecent assault in count (5), said that the appellant took her inside the house when she went to the appellant's place on an unspecified day in 2013 to get some tea. The appellant then, having sent her wife away to the shop, stretched his hand inside her skirt and tried to touch the private parts between her thighs. MN said that she had complained of the incident to the mother on the same day. MN, too, did not offer an explanation as to why there was a delay in complaining

to police. Though cross-examined, MN's evidence was not sought to be impeached or displaced despite the delay in complaining to police.

[14] Ms Maria Selemai, an aunt of the complainants, was the only other witness. Testifying before court, she said that MN had told her about the sexual act committed by the appellant on MN. Ms Selemai said that she later complained the matter to police in September, 2014, and identified the appellant as the person against whom MN had complained of.

'No case to answer' submission

[15] At the close of the prosecution's case, learned counsel for the appellant had contended that there was a case for the appellant to answer in respect of count Nos (1), (3), (4) and (5) only, but not in respect of count No (2), which related to the attempted rape, on the basis that the appellant was only holding onto the skirt of the complainant. Learned counsel submitted that such evidence fell short to constitute the offence of attempted rape. Learned counsel for the state, on the contrary, submitted that there was *some evidence* to support the charge of attempted rape as the offence of rape would have been completed if the complainant had not offered resistance.

[16] The learned trial judge, relying only on the statement of the complainant-MN that the appellant had attempted to rape her, had found a case for the appellant to answer in respect of count (2) as well, and called for defence in respect of all five counts.

Appellant's Evidence and conclusion of the case

[17] The appellant gave sworn evidence and denied the allegations. The appellant said that he was not at home when SK came to his house in 2009 and 2011 but accepted that he was at home when MN came to his house in 2013. He further said that the witness-Maria Selemai was not on good terms with him and denied each of the allegations in the five counts in relation to the two complainants.

[18] The learned trial judge summed-up the case to the assessors at the end of testimonies on behalf of the prosecution and the defence. At the conclusion of the proceedings of the trial, the appellant was found guilty in respect of all charges in the five counts by a

unanimous opinion of the assessors. The learned trial judge agreed with the opinion of the assessors and convicted the appellant on all five charges in the five counts.

Appellant's appeal

[19] The appellant appealed against the conviction and the sentence on the basis of the grounds urged in the amended notice of appeal dated 27 March 2017. The state conceded that the ground (2) urged in support of the appeal was arguable. The learned single Justice of Appeal, after a hearing, where the appellant, too, was represented by counsel, granted leave only on grounds (2) and (3) contained in the notice of appeal. Those two grounds as they now remain are:

> *(i) That the learned trial judge erred in law and in fact when he informed the assessors that <u>a prima facie case was found at the end of the prosecution's case against the appellant</u>; thereby, causing prejudice to the appellant; and,*
>
> *(ii) That the learned trial judge erred in law and in fact when he misdirected the assessors on an irrelevant issue of identification when the appellant had not disputed identification and thereby confusing the assessors which was unfair to the appellant.*

[20] At the hearing, learned counsel confined himself to the above two grounds and made submissions in support. Opposing the appeal, learned counsel for the state made submissions in reply. Parties relied on the written-submissions filed at the stage of leave to appeal before the single Justice of Appeal.

Appellant's first Ground of Appeal

[21] This court considered the ground of appeal and the submissions made by learned counsel. The objectional part of the summing-up of the learned trial judge is found in paragraph (25), where the learned trial judge stated as follows:

> *On 12 May 2015, the first day of trial, the information was put to the accused in the presence of his counsel. He pleaded not guilty to all counts. In other words, he denied all the allegations against him. When a <u>prima facie case was found against him</u> <u>at the end of the prosecution's case</u>, wherein he was put to his defence, he chose to give sworn evidence in his defence and called no witnesses. That was his right.*

Law on 'No case to answer'

[22] The end of the case for the prosecution, as referred to by the learned trial judge, marks an important stage in a criminal trial because a trial judge is called upon to exercise certain powers at that stage. The need for the careful exercise of such power is signified by recognition of those powers in the written laws governing criminal procedure in almost all contemporary jurisdictions. The Fiji's Criminal Procedure Act, 2009, for example, makes provisions as follows:

> *231. (1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.*
>
> *(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence, inform each such accused person of their right —*
>
> *(a) to address the court, either personally or by his or her lawyer (if any); and,*
> *(b) to give evidence on his or her own behalf; or*
> *(c) to make an unsworn statement; and*
> *(d) to call witnesses in his or her defence.*
>
> *(3)...*
>
> (Emphasis added)

[23] Section 231, *inter alia,* envisages two situations, namely *'...there is no evidence... [to proceed with]'* under sub-Section (1) and *'...there is evidence ... [to proceed with]'* under sub-Section (2). In either situation, the court has to make a provisional determination. It was in the spirit of sub-Section (1), and on application of principles of fairness, that court hears submissions from both counsel albeit the court was empowered to make such a determination *ex-mero motu.*

[24] The learned judge, in this case, exercised the power under Section 231 quite reasonably, lawfully and in a fair manner when he considered the status of the prosecution case against the appellant in the absence of the assessors on 13 May 2015 in the course of the trial in respect of all counts.

[25] The learned judge's decision to find a case for the appellant to answer in respect of count (2) is, however, debatable; and, I will address that issue separately in a later part of my judgement. Subject to above, the learned judge's exercise of his power in light of the provisions of Section 231 of the Criminal Procedure Act, 2009, at the close of the prosecution's case, is undoubtedly in accord with the law and the procedure adopted in a criminal trial.

[26] The learned judge's decision to excuse the assessors at the deliberations to find out whether there was a case for the appellant to answer in relation to each count, as required under Section 231 (1) of the Criminal Procedure Act, shows that the learned judge was quite alive to the fact that such a matter must be deliberated on, in the absence of assessors to avoid a possible prejudicial impact on the appellant.

[27] However, having taken all cautionary measures at the close of the prosecution case, the learned judge appears to have fallen into error, when he referred to the objectionable part in paragraph (25), as noted above in the grounds of appeal, when he delivered the summing-up.

[28] The law on the point is very clear, as spelt out in Blackstone's Criminal Procedure [2014], where it is stated at paragraph D 16.67:

> *Submissions of no case should be made in the absence of the jury, and should not be referred to in their presence thereafter if they are unsuccessful. This was made clear by the Court of Appeal in* ***Smith (1986) 85 Cr App R 197****. In that case, in which the identification evidence was relied on, the judge told the jury during the summing-up that, if he had not thought there was sufficient evidence of identification, he would have withdrawn the case from them. Watkins LJ said (at p.200 emphasis added):*
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> > *That is an improper observation for a judge to make to a jury. Submissions [of no case to answer] are made in the absence of the jury. There is very good reason for that as all who take part in trials know. The question as to whether or not there is sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because*

they think the judge's view is a sufficient indication that the evidence is strong enough for that purpose.

(Underlined for emphasis)

Misdirection by the Judge

[29] The learned judge, in this case, was telling that: *'…When a prima facie case was found against [the appellant], at the end of the prosecution's case, wherein [the appellant] was put to his defence, he [chose] to give sworn evidence in [the appellant's] defence and called no witness. That was [appellant]'s right*.

[30] I am of the view that a direction to such an effect is not acceptable as it would give the indication to the assessors that the learned judge had already found a case against the appellant and that they (the assessors) should follow, accordingly. Although, the learned judge had taken all the procedural steps rightly in dealing with the *no case to answer* application at the end of the prosecution's case in terms of Section 231, the above reference of having a *prima facie* case against the appellant in a summing up, as revealed in paragraph (25) is not permissible in law.

[31] Learned counsel for the state, both at the leave stage and at the substantive hearing, commendably conceded that the learned judge was in error in his reference as to the existence of a *prima facie* case against the appellant in paragraph (25) of the summing-up. Learned counsel's concession assisted this court to determine an important issue in the way that the law should be, appreciating a laudable principle in criminal jurisprudence in this country as well as elsewhere.

[32] I, accordingly, hold that there is merit in the complaint made on behalf of the appellant in the first ground of appeal. Nevertheless, I subscribe to the view that, although the learned judge had made a general reference as to the existence of a *prima facie* case, he had not referred to any specific contested issue in a conclusive manner as found in *Smith's* case (supra). Hence, I am of opinion that no perceivable prejudice could have caused to the appellant affecting the legitimacy of the trial.

[33] Moreover, upon consideration of the evidence and the way the case was run on behalf of the appellant, I do not think that there could have been substantial miscarriage of justice in light of the uncontroverted overwhelming evidence against the appellant in respect of the charges in counts (1), (3), (4) and (5). In the circumstances, notwithstanding the first ground bearing merit, I am of opinion that it would not furnish a concrete basis to uphold the appeal in order to reverse the finding of guilt against the appellant in respect of count Nos (1), (3), (4) and (5) on the information on application of the proviso to Section 23 (1) of the Court of Appeal Act. [**Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019)[.

[34] I, accordingly, reject the first ground of appeal as it is not capable of succeeding for the reasons set-out above.

Conviction on the 2nd count

[35] I would now consider the propriety of the conviction of the appellant in respect of count (2) where the appellant stood charged for attempted rape punishable under Section 208 of the Crimes Act. The charge was founded against the appellant on the basis of the appellant allegedly attempting to have had carnal knowledge with SK, as the particulars of the offence disclosed in terms of count (2).

[36] This matter cannot, in my view, be left unaddressed once it became apparent on the face of the transcript of the record, although there was no ground of appeal to that effect. As a court hearing criminal appeals, it is indeed necessary to consider a matter, which appears to have been in error.

[37] Evidence of SK was that the appellant had only held her and tried to take-off the skirt. There was no any other evidence to show that the appellant was attempting to have carnal knowledge in a manner capable of establishing any of the elements of the offence of rape under Section 207 (1) read with 207 (2) (a) of the Crimes Act, 2009.

[38] Section 44 of the Crimes Act, 2009, provides that, for a person to be guilty of an '*attempt'*, the person's conduct must be more than merely preparatory to the commission of the offence. On the facts and circumstances of this case, the conduct of the appellant does not, in my view, meet even the threshold of preparation to have

carnal knowledge to bring home a charge of attempted rape. That is because the act of attempt, as complained of, was not proximate to any of the elements of the substantive offence of rape, as defined Section 207 (1) read with 207 (2) (a) of the Crimes Act, 2009. Hence, the charge of attempted rape in count (2) must necessarily fail.

[39] In the circumstances, I take the view that the learned counsel's application at '*no case to answer*' stage was correct and should have been upheld. I am of the view that the learned judge erred in holding that there was '*some'* evidence against the appellant in respect of count (2) as the learned judge does not seem to have appreciated the matter in light of the definition of 'attempt' within the meaning of Section 44 of the Crimes Act, 2009.

[40] I, accordingly, quash the conviction entered against the appellant on count No (2); and, set-aside the sentence of three-year imprisonment passed thereon.

Second Ground of Appeal

[41] I will now turn to the second ground of appeal. The second ground related to the direction of the learned judge on identification. The learned single Justice of Appeal granted leave on the basis that the identification of the appellant was not an issue at the trial; and, that the learned judge mistook the denial of the allegations by the appellant as a case of disputed identification. This ground of appeal was based on the contents of paragraphs 32-34 of the summing-up. They read as follows:

> ***(e) Identification of Accused by PW1 and PW2:***
>
> 32. *The accused, in his evidence, denied PW1 and PW2's allegation against him. So presumably, he must be taken to dispute the validity of PW1 and PW2 identifying him in court, as the person, who offended against them. In other words, the accused must be taken to dispute PW1 and PW2 identifying him, at the material times, when the alleged offences, were said to have been committed*
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> *33. I must therefore, as a matter of law, warn you as follows. First, whenever 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, because an honest and convincing witness may be mistaken. Second, 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? Has she any special reason for remembering the accused's face? Was a police identification parade held? Third, are there any specific weaknesses in the identification evidence? If the quality of the identification evidence is good, you may rely on it. If the quality is bad, you must reject it.

34. At all the times the accused allegedly raped PW2, they were in close proximity. PW2 clearly recognized the accused as the person offending against her. She recognized him as her uncle. There was no need for a police identification parade, because she recognized the accused as her uncle. Furthermore, the accused and PW2 lived next to each other, and almost see each other every day. The same arguments arises with PW1. When she was indecently assaulted, she was sitting next to the accused. She knew him as her grandfather. It would appear that the quality of PW1 and PW2 identifying the accused was of a high quality, and you may rely on them. It is a matter entirely for you.

[42] Learned counsel's complaint in founding the second ground of appeal is that the directions on identification were wholly irrelevant and inappropriate, stating that they could cause confusion in the minds of the assessors. The position of the appellant was that he (the appellant) had not run the case on the basis of non-identification or mistaken identification but only on the basis of denials; hence, directions on identity became irrelevant.

Turnbull Guidelines

[43] When the contents of the relevant paragraphs are considered, it would appear that the learned judge had dealt with the issue [of identification] on the basis of some of the *Turnbull* guidelines (**R v Turnbull** [1977] QB 224) on identification. The summing-up on the issue, though concise, cannot be faulted as having contained misdirections, insofar as the guidelines on identification are concerned. However, the issue was whether such directions were necessitated in light of the complaint of the appellant that the assessors could get confused.

[44] The matter has to be looked into, in the context of the principle that the identity of an accused will always be a relevant issue to be factored in, in a criminal trial. The issue must not be left unaddressed so as to create even a slightest doubt.

Judge's Role

[45] The scope of a summing-up; and, a trial judge's role in a criminal case, were considered by the Supreme Court of Fiji in **Ram v State** [2012] FJSC 12: CAV0001.2011 (09 May 2102), having adopted what was said in **Von Stark v the Queen** 1 WLR 1270 at 1275. It was to the following effect:

> *The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them.*

[46] The responsibility to deal with the issue of identification always occupies a significant position in the overall functions of a trial judge. The law on identification was considered in **Rusiate Savu v State** [2014] FJCA 208; AAU0090.2012 (05 December 2014), where the Fiji Court of Appeal referred to ***Semisi Wainiqolo v State*** (Unreported Criminal Appeal No AAUu0027 of 2006; 24 November 2006 at [9]; and, ***Mesake Sinu v State*** (Unreported Criminal Appeal No AAU0037 of 2009; 13 March 2013 at [21] and held that Turnbull guidelines are accepted in Fiji.

Turnbull Guidelines on a Recognition and Identification Case

[47] Relying on the authority of the decision of the English Court of Appeal in **R v Thomas** [1994] Crim. L R 120, the Fiji Court of Appeal in **Savu**'s case (supra) faulted the Magistrate for her holding that the Turnbull guidelines were inappropriate as the case was not that of a fleeting glance but one of recognition. The Court of Appeal held that Turnbull guidelines would apply even to cases of disputed recognition as there was a need to assess whether a witness is mistaken in his or her purported

recognition of the accused. The risk is assessed, it was held, by taking into the Turnbull guidelines against the circumstances.

[48] The Privy Council, in **Beckford and Others v Reginam** [1997] Crim. App R 409 at 413, held that a general warning on Turnbull lines was required in recognition cases as well as those involving the identification of a stranger, and the warning was nonetheless required even if the sole or main thrust of the defence was directed to the issue of identifying witness's credibility, that is, whether his evidence was true or false, as distinct from accurate or mistaken.

[49] However, there seems to be some ambivalence in judicial precedents as to the applicability of Turnbull guidelines in recognition cases; but, in my view, it would be inappropriate to lay down an inveterate rule on its relevance or otherwise for its application universally as observed in Beckford's case (supra at p 415).

Evidence and the Judge's summing-up

[50] When the contents of the summing-up, in this case, are considered, I am of the view that they were not harmful or disadvantageous to the appellant. Instead, in the overall satisfaction of the burden of proof in light of the presumption of innocence, which continued to be in force favouring the appellant through-out the trial, I am inclined to think that it became incumbent on the learned judge to deal with the issue of identification in this case. The need could not have been dispensed with merely because the case was run by the appellant on the basis of denials.

[51] Conversely, the denials, in my view, brought into the fore the issue whether the complainants-SK and MN, had in fact mistaken the identity of the appellant instead of some other perpetrator of the '*crimes*' on them. This could well have been troubling the minds of the assessors, which certainly would justifiably compel the learned judge to address them to be sure of the identity of the appellant.

[52] Moreover, the evidence of the appellant under cross-examination was that he was not at home when SK came to his house in 2009 and 2011; and, he was at home when the MN came to his house in 2013 to fetch tea leaves. Given the fact that the charges were laid in relation to unspecified dates during long spans of time in years 2009; 2011;

and; 2013, the correct identification could really have emerged as a contentious issue in the minds of the assessors.

Conclusions

[53] I am of opinion that the learned trial judge was cautious enough, as he was required to be, and addressed the issue of identification quite rightly and within the parameters of the law. The learned judge cannot be faulted for this lawful exercise of his function so as to furnish a ground of appeal as formulated by the appellant in this case.

[54] Upon consideration of the facts and circumstances of the case especially the implication of the appellant on single offending incident each within a span of one year as charged, the learned trial judge had to be more cautious to be sure that the two complainants-SK and MN, did make no mistake as to the identification of the appellant in view of the long lapse of the time.

[55] I am of opinion that there was no room for conceivable confusion in the minds of the assessors causing substantial miscarriage of justice by the directions in paragraphs 32-34 of the summing-up. Therefore, the second ground of appeal is not entitled to succeed.

[56] I, accordingly, reject the second ground of appeal, as it is devoid of merit.

[57] As the appellant does not succeed in anyone of the two grounds urged before this court, I hold that the appeal should stand dismissed.

Orders are:

(i) Appeal against the conviction on count Nos. (1), (3), (4), and (5) dismissed;
(ii) Conviction on counts Nos. (1), (3), (4) and (5) affirmed;
(iii) Appeal against the conviction on count No (2) allowed;
(iv) Sentence on count (2) set-aside; and,

(v) *Sentence of thirteen-year imprisonment with a non-parole period of eleven years in respect of count Nos. (1), (3), (4) with the concurrent sentence of one year on count (5), affirmed.*

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL