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

CRIMINAL APPEAL NO. AAU 152 of 2019
[In the High Court at Lautoka Case No. HAC 45 of 2015]

BETWEEN	:	**APOROSA DAUVUCU** **SEVANAIA LALABALAVU** **TEVITA VIBOTE** **SEVANAIA VARANI** **WAISAKE WAIDILO** **NACANIELI LABALABA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the 01st Appellant**
	:	**Ms. N. Khan for the 02nd to 06th Appellants**
	:	**Ms. R. Uce for the Respondent**
Date of Hearing	:	**03 December 2021**
Date of Ruling	:	**06 December 2021**

RULING

[1] The appellants had been indicted in the High Court at Lautoka with six counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 17 March 2015.

[2] The information read as follows:

*'**COUNT ONE***

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***APOROSA DAUVUCU** , between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.*

COUNT TWO

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***SEVANAIA LALABALAVU**, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.*

COUNT THREE

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***TEVITA VIBOTE**, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.*

COUNT FOUR

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***SEVANAIA VARANI**, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.*

COUNT FIVE

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***WAISAKE WAIDILO**, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.*

COUNT SIX

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***NACANIELI LABALABA**, between the 17th day of March, 2015 and the 18th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **SELAI KOROI** with his penis without her consent.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellants were not guilty of respective counts of rape. The learned trial judge had disagreed with the assessors' opinion, convicted the appellants and sentenced each of them on 04 October 2019 to a sentence of 11 years, 09 months and 15 days of imprisonment (after the remand period was deducted) with a non- parole period of 09 years.

[4] The appellant's appeal against conviction and sentence (21 October 2019) filed in person is timely. Subsequently, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence and written submission on 04 August 2020 on behalf of the 01st appellant. Natasha Khan Associates appearing for the 02nd to 06th appellants had indicated to court on 28 October 2020 that it would rely on the grounds of appeal (04) tendered by the appellants on 21 October 2019. However, the written submissions filed by the said lawyers on 18 March 2021 contain 06 grounds of appeal. The state had tendered its written submissions on 23 November 2021.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test in a timely appeal for leave to appeal against sentence is **'reasonable prospect of success'** [see

Caucau v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

(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.

[7] The grounds of appeal urged on behalf of the appellants against conviction and sentence are as follows:

(01st appellant)

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and in fact when he convicted the appellant without giving cogent reasons for disagreeing with the unanimous opinion of the assessors.

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he failed to thoroughly and properly and independently assess the complainant's evidence and its own contradictions which raised a reasonable doubt in the State case and the Learned Trial Judge's failure in relying on the complainant's contradictory evidence caused a miscarriage of justice against the appellant.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he misdirected the assessors and himself in relying and accepting the evidence of recent complaint made to Mere Nabiau.

Sentence

Ground 4

THAT the Learned Sentencing Judge sentenced the appellant to an imprisonment term that is harsh and excessive.

(02nd-06th appellants)

Ground 1

THAT the Learned Trial Judge erred in law in failing to adequately and/or sufficiently provide cogent reasons for overturning the unanimous verdict of the assessors and in particular not affording proper independent assessments to the significance of Jonetani Nayate's evidence and consider the failure of the state to adduce rebuttal evidence as per Section 180 of Criminal Procedure Act.

Ground 2

THAT the Learned Trial Judge erred in law by failing to consider in the summing up or in the judgment the evidence of each of the appellants where it corroborates the evidence of another appellant or where such evidence is any way favourable to any of the other appellants.

Ground 3

THAT the Learned Trial Judge erred in law to independently and/or adequately assess the totality of the evidence and conclude the impossibilities of the complaint alone asserting such events when the allegation was purported to have occurred in the village and the likelihood/probabilities that many villagers would have witnessed the events and therefore failed to independently analyse the circumstances in such context contravening the rule laid down in ***Ram v State*** *[2012] FJSC 12; (CAV0001 of 2011S).*

Ground 4

THAT the Learned Trial Judge had not adequately dealt with the issue of inconsistencies of evidence in the rule laid down in ***Singh v State*** *(CAV 0007.05).*

Ground 5

THAT the Learned Trial Judge failed in law to adequately and/or sufficiently consider the defence.

Sentence

Ground 1

THAT the sentence is harsh and excessive in all circumstances.

[8] The trial judge in the sentencing order had summarized the prosecution evidence against the appellants as follows:

> 2. *The brief facts were as follows:*
>
> > *On 17th March, 2015 the victim Selai Koroi was drinking with all the accused persons in a house in their village. The drinking continued till the early hours of the following morning. By this time the victim was really drunk so she slept.*
>
> 3. *The victim woke up when she felt someone pulling her shorts, when she opened her eyes she saw the first accused also known as Abo pulling her shorts while the other accused persons were looking at her. At this time her panty was also removed thereafter, Sevanaia Lalabalavu the second accused came removed his pocket 'sulu' and had sexual intercourse with her by inserting his penis inside her vagina.*
>
> 4. *After the second accused finished having sexual intercourse, Tevita, the third accused came, knelt down and then inserted his penis inside her vagina and had sexual intercourse with her.*
>
> 5. *After him, the fourth accused also known as Aldo came, and had sexual intercourse with the victim. Thereafter, Waisake, the fifth accused and the sixth accused, Labalaba came, and had sexual intercourse with the victim.*
>
> 6. *Finally, the first accused Abo came and had sexual intercourse with the victim, at this time she felt pain so she tried to push the accused away by pushing his chest. The other accused persons were standing and watching what the first accused was doing. The victim started crying and was afraid although she was feeling really weak, when she felt pain she pushed the accused away. Whilst crying she tried to wear her shorts and at the same time she yelled at all the accused persons telling them not to come close to her.*
>
> 7. *According to the victim all the accused persons had sexual intercourse with her for about four to five minutes each and she does not know where the accused persons had ejaculated. The victim was lying straight she did not do*

anything such as push the accused persons away because her body was weak she could not move or shout or call for help or try to stand up and leave since she was really drunk and feeling weak.

8. *When the victim came out of the house, Tevita, (third accused) and Labalaba (sixth accused) came and held her hand and tried to stop her from shouting. The victim was shouting on the road for about 15 minutes after a while her friend Mere and her uncle Marika came. The victim's uncle Marika came and shouted at Labalaba and Tevita to release the victim's hand.*

9. *Thereafter, the victim went to Mere's house and lay down in a room. After a while, Labalaba (sixth accused) and Sevanaia Lalabalavu (second accused) came near the window of Mere's house and wanted to apologize.*

10. *The victim did not answer at this time Mere's aunt Rusila came and chased the two away she then slept. When the victim woke up she told Mere about what all the accused persons had done to her. The victim did not consent to have sexual intercourse with all the accused persons.*

11. *Furthermore, in respect of the seventh count which concerns the sixth accused only (to which the sixth accused had pleaded guilty) the brief facts were as follows:*

12. *While the victim was shouting and crying on top of her voice, the sixth accused Nacanieli Labalaba punched the victim on her face and told her to keep quiet.*

    The matter was reported to the Nadi Police Station and investigations were carried out. The victim was also taken to the hospital where the following injuries were noted:

    1. Swelling noted on the right side of the cheek;

    2. Tenderness over right side of mandible (face).

The accused was interviewed under caution by DC 3855 Setareki at the Nadi Police Station where he admitted slapping the victim on her face twice. The sixth accused was subsequently charged for the offence of assault causing actual bodily harm.

[9] The allegation of rape had been totally denied by the appellants. The 01st, 02nd and 04th appellants had remained silent. The 03rd appellant had given evidence and called one witness. The 05th and 06th appellants too had given evidence. The 02nd and 06th appellants also had called one witness.

01st and 02nd grounds of appeal (01st appellant) and 01st, 03rd, 04th and 05th grounds of appeal (02nd to 06th appellants)

[10] At this stage it is convenient to consider the above grounds together.

[11] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021).

[12] In answering the question whether the failure to give cogent reasons alone fatal to a verdict, the Court of Appeal said in **Fraser v State** (supra) that:

> *'[30] In other words, the argument proceeds to state that irrespective of whether the trial judge had failed to give cogent reasons in the judgment in disagreeing with the assessors, still the Court of Appeal could independently assess the totality of evidence by way of rehearing to determine whether there is any ground enumerated in section 23 Court of Appeal Act upon which the verdict should be set aside and if not, the verdict would not be disturbed. The appellate function is prescribed by section 23 of the Court of Appeal Act. There seems to be merits in this argument and it commends itself to me.'*

[13] The appellants had developed on the ground that the trial judge had failed to give reasons in the judgment by arguing under the other grounds of appeal that the judge had not thoroughly, properly and independently assessed the complainant's evidence and the contradictions in her evidence and not considered the inconsistences and improbabilities in her evidence. It is also alleged that the trial judge had not adequately considered the defense evidence.

[14] The respondent on the other hand argued that the trial judge had indeed given cogent reasons and analyzed all the evidence including the defense evidence in the judgment. The state has further argued that the alleged contradictions, inconsistences and improbabilities do not either exist or they do not go to the root of the prosecution case as to discredit the complainant [see **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)].

[15] It is trite law that in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not. He is the ultimate finder of facts and the authority on law [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015], **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. Therefore, the trial judge was entitled in law to overrule the assessors and proceed to pronounce a judgment as aforesaid.

[16] The appellants' arguments go to the broader questions whether the verdict is unreasonable or cannot be supported having regard to the evidence and whether there had been a miscarriage of justice.

[17] The test for the Court of Appeal in considering the question whether the verdict is unreasonable or cannot be supported having regard to the evidence is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the trial judge, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the trial judge to be satisfied of guilt beyond reasonable doubt, which is to say whether the judge must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is

another way of saying that it was "not reasonably open" to the judge to be satisfied beyond reasonable doubt of the commission of the offence [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Koli v State** [2021] FJCA 97; AAU116.2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493)].

[18] The test for substantial miscarriage of justice is that nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error or errors which allegedly occurred in the case did not amount to a "substantial miscarriage of justice " if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal. A conviction will only be inevitable where the appellate court is satisfied that, if there had been no error, there is no possibility that the trial judge, acting reasonably on the evidence properly admitting and applying the correct onus and standard of proof, might have entertained a doubt as to the accused's guilt [vide **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021), **Chand v State** [2021] FJCA 95; AAU108.2015 (27 May 2021) and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)].

[19] Needless to state that at this stage I cannot undertake any of these tasks without the complete appeal record.

[20] Therefore, without making any observations, for I cannot examine the appellants' complaints without the appeal record, as to whether the appellants have a reasonable prospect of success on the above grounds of appeal, I would allow leave to appeal to enable the full court to examine the complete record and adjudicate on and see the merits of these grounds of appeals.

[21] However, I do not think there is any merits in the 02nd to 06th appellants' complaint that there was a failure of the state to adduce rebuttal evidence as per section 180 of Criminal Procedure Act. There was no such obligation on the part of the respondent.

03rd ground of appeal **(01st appellant)**

[22] The 01st appellant submits that the trial judge had misdirected the assessors and himself in relying and accepting the evidence of the recent complaint made to Mere Nabiau.

[23] The summing-up and the judgment reveal that the complainant had related the incident to Mere Nabiau who was a defense witness. What the complainant had told Mere Nabiau is not clear. Mere Nabiau had said that the complainant told her that the appellants attempted to rape her but under cross-examination she had said that she could not recollect whether the complainant told her that the appellant had tried or actually had sexual intercourse with the complainant.

[24] The trial judge seems to have treated Mere Nabiau's evidence as recent complaint evidence and directed the assessors accordingly. The directions were in consonance with guidance provided in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) and **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017). The appellant does not complain of misdirection therein. The question is whether Mere Nabiau's evidence could be treated as recent complaint evidence.

[25] What the summing-up and the judgment do not reveal is whether the complainant had told in her evidence that she told Mere Nabiau that the appellants raped her or whether at least she had revealed material and relevant unlawful sexual conduct on the part of the appellants. Another question is whether both the complainant and Mere Nabiau had testified as to the terms of the complaint.

[26] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court set down the law regarding recent complaint evidence as follows:

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v. Whitehead*** *(1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness:* ***Basant Singh & Others v. The State*** *Crim. App. 12 of 1989;* ***Jones v. The Queen*** [1997] HCA 12*;* (1997) 191 CLR 439*;* ***Vasu v. The State*** *Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint:* ***Kory White v. The Queen*** [1999] 1 AC 210 *at p215H. This was done here.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
>
> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'*

[27] This matter should have been raised by way of redirections as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018) and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[28] However, it is worthwhile for the full court to examine whether what Mere Nabiau had told court could be treated as recent complaint evidence though despite the alleged misdirection the assessors had still found the appellants not guilty. Nevertheless, the trial judge seems to have considered Mere Nabiau's evidence as recent complaint evidence going to the credibility of the complainant in overturning the assessors' opinion.

02nd ground of appeal (02nd to 06th appellants)

[29] The appellants argue that the trial judge erred in law by failing to consider in the summing up or in the judgment the evidence of each of the appellants where it corroborates the evidence of another appellant or where such evidence is any way favourable to any of the other appellants.

[30] The trial judge had dealt with the evidence of all appellants in the summing-up and the judgment. Since the trial judge had not believed any one of them he did not have to consider the alleged complimentary nature of their evidence.

[31] I do not see how this ground of appeal can stand on its own but the full court may consider it under the main grounds of appeal earlier dealt with whether the trial judge had erred in not considering the evidence of one appellant supplementing or complimenting another's evidence in their favour.

Sentence appeal (all appellants)

[32] All of them submit that the sentence is harsh and excessive in all circumstances.

[33] The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the starting point of 08 years selected by the trial judge is almost at the lower end of the tariff and the trial judge has followed this sentencing tariff.

[34] Having taken 08 years as the starting point, the trial judge had added 05 years for aggravating factors. The 02nd to 06th appellants submit that the discount off 01 year for previous good character and for other mitigation factors is insufficient. In Fiji personal circumstances carry little migratory value in sexual offences – vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] and it appears that the mitigation pleaded consisted of almost all personal factors.

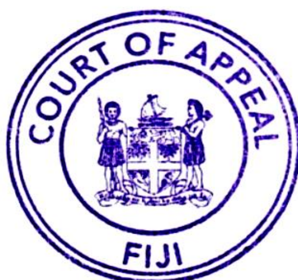
[35] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (**vide** **<u>Koroicakau v The State</u>** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**<u>Sharma v State</u>** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

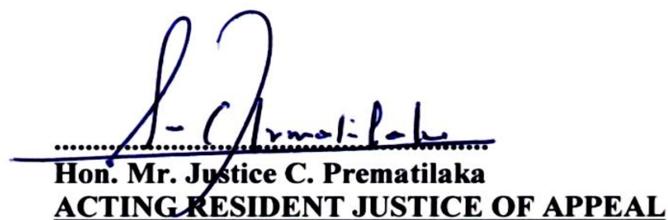
[36] I see no reasonable prospect of success in the appellant's appeal against sentence. It cannot be called disproportionate, harsh or excessive. Quantum of the sentence can rarely be a ground for the intervention by the appellate court [vide **<u>Raj v State</u>** (supra)].

[37] Thus, though leave to appeal is granted against conviction to enable the full court to hear full arguments with the benefit of the complete appeal record, I cannot say at this stage that as a whole the appeal has a reasonable prospect of success against conviction [vide **<u>Waqasaqa v State</u>** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

<u>Orders</u>

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.





Hon. Mr. Justice C. Prematilaka
<u>ACTING RESIDENT JUSTICE OF APPEAL</u>