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

CRIMINAL APPEAL NO.AAU 108 of 2015
[In the High Court at Labasa Case No. HAC 038 of 2014LAB]

BETWEEN	**:**	**RITESH VIKASH CHAND**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**07 May 2021**
Date of Judgment	**:**	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Labasa with one count of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Labasa in the Northern Division on 17 April 2014.

[2] At the end of the summing-up, the majority of assessors (02) had opined that the appellant was guilty of rape and the remaining single assessor's opinion had been that he was not guilty. The learned trial Judge had agreed with the majority opinion, convicted the appellant as charged and sentenced him to imprisonment of 10 years with a non-parole period of 07 years.

[3] The appellant's appeal against conviction had been timely. Only a single ground of appeal had been canvased against conviction by the Legal Aid Commission at the leave to appeal stage with the single learned Judge allowing leave on 24 May 2019. The sole ground of appeal placed before the single learned Judge was as follows:

> *'The learned trial Judge erred in law and in fact when he misdirected the assessors that the complainant was tired at the end of the day as to the reason why she admitted in cross-examination and re-examination that the accused did not penetrate her vagina with his penis when no evidence was adduced during the trial by the complainant that she was tired.'*

[4] The Legal Aid Commission had filed an amended notice of appeal on 07 April 2020 with four additional grounds of appeal (02nd to 05th) not taken up before the single learned Judge and written submission in support thereof. The state had also filed written submissions in reply on all five grounds of appeal. The appeal grounds placed before the full court were as follows:

> ***'Ground 1***
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> *The Learned Trial Judge erred in law and in fact when he misdirected the assessors that the complainant was tired at the end of the day hence the reason why she admitted in cross examination and re-examination that the accused did not penetrate her vagina with his penis, that this was a grave error given no evidence was adduced during the trial by the complainant that she was tired as such caused a grave miscarriage of justice towards the Appellant.*
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> ***Ground 2***
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> *The Learned Trial Judge erred in law and in fact when he stated as his reasoning in his Judgment that "….I reject the answers she gave when she was cross-examined and re-examined, as it was given by a mentally slow person who was frustrated and tired by the legal process…" when there was no legal basis for this and there was no evidence adduced to reasonably substantiate the same as such this caused a great miscarriage of justice towards the appellant.*
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> ***Ground 3***
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> *The Learned Trial Judge erred in law and in fact when he allowed the evidence of Sera Sarika stating "…She said she knew his name. His name was Ritesh…" which was hearsay evidence and should have been also directed to the assessors to disregard this evidence and its allowance caused a grave miscarriage of justice towards the appellant.*

Ground 4

The Learned Trial Judge erred in law and in fact when he permitted the identification evidence that was before the Court without the State establishing the proper foundation on identification and even with permitting such evidence, he failed to properly direct the assessors on it thus resulting in a grave miscarriage of justice.

Ground 5

The Learned Trial Judge erred in law and in fact when he failed to properly and adequately direct the assessors and himself on the use of the admissions in the caution interview and the direction to the assessors to consider the admissions (if accepted) with the rest of the evidence led during trial, the absence of such proper and adequate directions to the assessors and to himself caused a grave miscarriage of justice to the appellant.'

[5] Given that the appellant had been sentenced on 27 August 2015, the delay in filing 02nd to 05th grounds of appeal is over 04 years and 08 months. Therefore, this court would now follow ***Nasila*** guidelines regarding the fresh ground of appeal and see whether enlargement of time should be granted to urge them before this Court.

[6] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

> *'[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.'*
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> *'[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.'*

[7] Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[8] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[9] It is clear that the delay is very substantial and the appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a **real prospect of success** in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide ***Nasila).*** The respondent had not specifically averred any prejudice that would be caused to the state by an enlargement of time.

[10] However, as a word of caution and advice I must state that the learned counsel and appellants in person should not abuse or overstretch this court’s approach taken in ***Nasila*** designed in the interest of justice to mitigate any hardship and prejudice caused to the appellant as a result of the learned counsel or the appellant in person, more often than not, not having in possession of the complete appeal record at the leave stage, to a point where the whole purpose of leave to appeal process would look like an exercise in futility.

[11] In that regard the following observations of Lord Bingham, Lord Chief Justice in **Cox & Thomas** [1999] 2 CAR 6 on seeking to advance fresh grounds of appeal post single learned Judge leave to appeal ruling are relevant:

> *'The purpose of the leave requirement in our judgment, like any other leave requirement, is to act as a filter: to weed out appeals that would have no reasonable prospects of success if leave were to be granted, and enable the court to concentrate its judicial resources on cases that have something in them.'*

[12] Further, in **R v James & Ors** [2018] WLR (D) 134; [2918] EWCA Crim 285 England and Wales Court of Appeal (Criminal Division) (Feb 8, 2018) remarked at paragraph (38) (ii) that consideration of the application for leave by the single learned Judge is an important stage in the process and should not be 'bypassed' solely on the basis that lawyers instructed post-conviction would have done or argued things differently from the trial lawyers. Fresh grounds advanced by fresh counsel must be particularly cogent.

Facts in brief

[13] The complainant (PW2) was 14 years old at the time of the incident and the appellant was 20 years old. On 17 April 2014, the complainant while playing with her friends had met the accused. The appellant had given her his mobile phone and then taken her to a nearby vacant house where he allegedly took off all her clothes while she was playing games in the mobile phone. The appellant had later inserted his penis into the complainant's vagina. The matter had been reported to the police and an investigation had been carried out. The appellant had been caution interviewed by the police.

[14] The appellant had denied the rape allegation against him and given sworn evidence but called no witness in his defence. In his evidence, the appellant had admitted that he met the complainant on 17 April 2014 in a vacant house. He said he had seen the complainant before in the golf ground. He had recalled having been interviewed by police in 2014. However, the appellant had said that he did not insert his penis into the complainant's vagina at any time.

01st ground of appeal

[15] The gist of the appellant's complaint under this ground of appeal has been succulently articulated by the single learned Judge in granting leave to appeal as follows:

> *'[6] In her evidence in chief the complainant stated that the appellant had penetrated her vagina with his penis. In cross-examination and re-examination she stated and confirmed that penetration had not occurred. It would appear that State Counsel in closing submissions claimed that the reason for the answers given by the complainant in cross-examination and re-examination was because the complainant had become tired by the end of the day. However at no stage was the complainant asked by Counsel or the trial judge if she was tired. In other words there was no evidence to support that submission by State Counsel. The learned trial Judge accepted the submission and made reference to it both in his summing up to the assessors and in his judgment.'*

[16] The learned counsel for the appellant has argued that the learned trial Judge had reiterated the statement made by the prosecuting counsel in her closing submission or address that the complainant was tired at the end of the day and that may be a reason why she said that the appellant did not rape her under cross-examination and re-examination causing a grave miscarriage of justice.

[17] The complainant (PW2) in examination-in-chief had stated *inter alia* that the appellant took her clothes off and inserted his penis into her vagina. She had said under cross-examination that the appellant gave her love bites but he did not take off her clothes and did not insert his penis into her vagina. She had reiterated under re-examination that the appellant did not insert his penis into her vagina in the vacant house at the material time.

[18] Earlier the complainant's aunt (PW1) had said in evidence that the complainant had told her that an Indian boy whom she named as Ritesh gave her love bites and inserted his penis into her vagina. The complainant had looked scared and was crying when the witness found her in the vacant house. The witness had also said that the complainant was attending a special school and mentally slow.

[19] Medical examination done after 03 days had revealed evidence of forced penetration on the basis of broken hymen and bruises on the vaginal outline. What object had penetrated the vagina or when the pentation had occurred had not been revealed by the doctor.

[20] The appellant in his evidence had admitted that he met the complainant at a vacant house on the day in question but denied giving her love bites or inserting his penis into her vagina. In his cautioned interview the appellant had admitted kissing each other, making love bites on the complainant's neck and telling her that he wanted to have sexual intercourse. However, he had denied having sexual intercourse with her in the cautioned statement.

[21] Therefore, the real issue is what impact the complainant's evidence in cross-examination and re-examination that the appellant did not take her clothes off or inserted his penis into her vagina in the vacant house at the material time would have had on the prosecution case.

[22] Unfortunately, the prosecuting counsel had not elicited from the complainant in re-examination as to what made her say in examination-in-chief that the appellant did take her clothes off and inserted his penis into her vagina but unequivocally denied the same under cross-examination and re-examination.

[23] Although, there had been a discussion between the learned trial Judge and the prosecutor of the possibility of a *nolle prosequi* being entered at the end of the complainant's evidence eventually the prosecutor had decided to proceed with the trial.

[24] What is recorded under closing submissions does not show that the prosecuting counsel had argued that the complainant was tired at the end of the day and that *may* be the reason why she said what she said under cross-examination and re-examination as adverted to by the learned trial Judge at paragraph 24 of the summing-up. Assuming that the prosecutor had advanced that explanation in her closing address or submissions a few important questions arise from that course of action.

[25] Had the prosecutor felt that the witness was tired towards the end of the cross-examination which does not appear to be very exhaustive, and that was or may have been the reason for her answer adverse to her position in examination-in-chief, the prosecuting counsel should and could have sought a short breather for the witness to relax and gather herself and continued with the re-examination. She could have her observations recorded by the learned trial Judge as well.

[26] Had the learned trial Judge observed a similar situation he on his own could have afforded a respite to the witness. The fact that neither the prosecutor nor the learned trial Judge had thought it fit to take that simple step shows that none of them had actually felt that the witness was in fact tired and not in a proper frame of mind to give rational answers. The learned trial Judge had not made any contemporaneous notes or observations of any sort to that effect either but put that proposition to the assessors as argued by the prosecutor.

[27] Therefore, had the prosecutor come up with that explanation in her closing address or submissions as stated at paragraph 24 of the summing-up she had no basis to do so. It was a speculative explanation. She had not created a factual basis to advance that proposition. Consequently, the learned trial Judge had no tangible ground to put that unfounded explanation to the assessors as a possible reason for the complainant's answers adverse to the prosecution and favourable to the appellant.

[28] In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) one of the learned defence counsel said in his closing address that *"the Police had not done enough to investigate this case"* and the learned trial Judge directed the assessors to ignore that submission. The Court of Appeal said in that context:

> *'[54] When presenting a closing address, counsel may confine himself to the facts or may relate the facts to the law. If there are weaknesses in the evidence, the weaknesses may be addressed in the closing address. What is not permitted is to invite the assessors to speculate on what evidence that could have been led but was not led by the prosecution. The law is that the opinions of the assessors and the verdict of the trial judge must be based on the admissible and relevant evidence led at the trial.'*

[29] A similar reasoning could be adopted to what the prosecutor had done in this case. She had speculated on why the complainant gave answers under cross-examination and re-examination denying removal of cloths and insertion of his penis into her vagina by the appellant. When that speculation was put to the assessors by the learned trial Judge the way he did without even an appropriate warning, it obviously got clothed with some degree of credibility and even sanctity.

[30] No allegation has been made against the conduct of the prosecuting counsel but it may be opportune to remind all prosecutors of the words of the Court of Appeal **Ali v State** [2011] FJCA 28; AAU0041.2010 (1 April 2011) lest they have been forgotten over the years:

> *'8. 'Said the very experienced and highly regarded Mr Justice Avory at page 623*:
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> > *"It is true that prosecuting counsel ought not to press for a conviction. In the words of Crompton J. In **Reg v. Puddick** 4 F. 497, 499, 'they should regard themselves' rather 'as ministers of justice' assisting in its administration than as advocates. The observation complained of may not have been in good taste or strictly in accordance with the character which prosecuting counsel should always bear in mind."*
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> *9. Since it is of the first importance I also cite the modern view upon the same matter. I take it from Blackstone 2011 Edition paragraph D15.3 at pages 1702 – 3. The recommendations of the Farquharson Committee on the role of prosecuting counsel, were published in Counsel, Trinity 1986. I set out the paragraph:*
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> > *"D15.3 Ministers of Justice In **Puddick** (1865) $F & F497, Crompton J said (at p.499) that prosecution counsel 'are to regard themselves as ministers of justice, and not to struggle for a conviction' (see also per Avory J in **Banks** [1916] 2 KB 621 at p.623. Some of the implications this has on the prosecutor's role are identified in the introductory paragraphs of the Farquharson report:*
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> > *There is no doubt that the obligations of prosecution counsel are different from those of counsel instructed for the defence in a criminal case or of counsel instructed in civil matters. His duties are wider both to the court and to the public at large. Furthermore, having regard to his duty to present the case for the prosecution fairly to the jury, he has a greater independence, of those instructing him than that enjoyed by other counsel. It is well known to every practitioner that counsel for the prosecution must conduct his case moderately, albeit firmly. He*

must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgment no longer sustains the charge laid in the indictment. If the evidence of a witness is undermined or severely blemished in the course of cross-examination, prosecution counsel must not present him to the jury as worthy of a credibility he no longer enjoys ... Great responsibility is placed upon prosecution counsel and although his description as a 'minister of justice' may sound pompous to modern ears it accurately describes the way in which he should discharge his function.

In ***Gonez*** *[1999] All ER (D) 674, the Court of Appeal endorsed the description of prosecuting counsel as a minister of justice, stating that it was incumbent on him not to be betrayed by personal feelings, not to excite emotions or to inflame the minds of the jury, and not to make comments which could reasonably be construed as racist and bigoted. He was to be clinical and dispassionate.'*

[31] The learned trial counsel for the appellant should have objected to the impugned explanation of the prosecuting counsel in the closing address, for the learned counsel for both the prosecution and defence should object to matters that prejudice the fair trial of an accused. Failure to do so creates a serious obstacle to raising the matter on an appeal (**R v Luhan** [2009] VSCA 30; **NJ v R** (2012) 36 VR 522; [2012] VSCA 256; **R v Momcilovic** (2010) 25 VR 436; [2010] VSCA 50; **MB v R** [2012] VSCA 248).

[32] However, as stated by the Court of Appeal in ***Laojindamanee:***

'*[23] When ascertaining whether the direction gave rise to any miscarriage of justice, the fact that no objection was taken is relevant because the absence of objection may be taken as an indication that counsel, absorbed in the atmosphere of the trial, saw that no injustice or error occurred in what the trial judge said or failed to say (R v Tripodina and Morabito (1988) 35 A Crim R 183, 191). However, the absence of objection to a trial judge's direction is not fatal to reliance on an error if it occasions a miscarriage of justice, 'but there are reasons to pause before embracing that conclusion' (Murray v The Queen [2002] HCA 26; (2002) 211 CLR 193, [73]).'*

[33] I agree that there may not be specific evidence on the demeanour of a witness. Still, demeanour of a witness cannot be plucked from thin air. It is always advisable to keep

some contemporaneous record of demeanour and deportment of a witness in the course of the trial for the assessors and the learned trial Judge to rely on it later to judge the credibility or lack of it of that witness.

[34] The learned trial Judge had said at paragraph 10 of the judgment that the complainant was getting tired as the trial went on and appeared frustrated by the legal process and said what she said under cross-examination and re-examination. Thus, the learned trial Judge had added another feature to explain the complainant's answers under cross-examination and re-examination which were adverse to her position under examination-in-chief. It is not clear how the learned trial Judge concluded that the complainant appeared frustrated by the legal process. If such a scenario was observed by the learned trial Judge when the complainant was giving evidence, in my view the judge should have addressed it then and there by taking appropriate remedial action to relieve the complainant of tiredness and frustration. The learned trial Judge had not made any note of such observations during the trial.

[35] The learned trial Judge seems to have considered the fact that the complainant was mentally slow too as a way of explaining her answers exculpatory of the appellant in cross-examination and re-examination. Her aunt has said in evidence that she was mentally slow and attending a special school but there was no scientific evidence on the practical effects of her condition *vis-à-vis* her evidence before court. Even assuming that she was a slow learner, that would not necessarily explain her answers in cross-examination and re-examination, for the same logic then has to apply to her answers in examination-in-chief favourable to the prosecution.

[36] The problem with trying to use her condition of being mentally slow, 'tired and frustrated with legal process' as explanations for her answers exonerating the appellant in cross-examination and re-examination is that there was no apparent nexus or causal relationship established between the two. By sheer logic, one can surmise that the exculpatory answers were due to those reasons. At the same time, one may argue that similar logic may suggest that her answers unfavourable to the prosecution in cross-examination and re-examination could be due to many other unexplained

reasons and one of them could be that what she said in cross-examination and re-examination represented the truth.

'Substantial miscarriage of justice'

[37] Guidance could usefully be obtained from the decisions of High Court of Australia and the Supreme Court (Court of Appeal) in Victoria in the application of the provisions in section 23(1) (a) read with the proviso of the Court of Appeal Act in Fiji. However, it should always be kept in mind that in Fiji, unlike the jury, the assessors are not the ultimate fact finders. It is the learned trial Judge who is the ultimate authority on facts and law and for determining guilt and innocence. The assessors assist the learned trial Judge and only express a non-bonding opinion. Subject to the above caution, several propositions of law on the scope of section 276(1) (a), (b) and (c) of Criminal Procedure Act 2009 (Vic) by the High Court of Australia and the Supreme Court (Court of Appeal) in Victoria are helpful in the application of the provisions in section 23(1) (a) read with the proviso of the Court of Appeal Act in Fiji.

[38] Section 276 of Criminal Procedure Act 2009 (Victoria) states as follows:

> *(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—*
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> *(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or*
>
> *(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or*
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> *(c) for any other reason there has been a substantial miscarriage of justice.*
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> *(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.*

[39] While not purporting to make an exhaustive statement of when there will be a substantial miscarriage of justice, the High Court has identified three situations in **Baini v R** (2012) 246 CLR 469; [2012] HCA 59):

- Where the jury's verdict cannot be supported by the evidence (*i.e.* where section 276(1)(a) is directed);
- Where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome;
- Where there has been a serious departure from the proper processes of the trial.

[40] Though, section 276(1)(a) of the Criminal Procedure Act 2009 (Vic) does not expressly refer to a substantial miscarriage, it is clear that such a result constitutes a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59). There has surely been a substantial miscarriage of justice if, in the words of paragraph (a), "the verdict of the jury is unreasonable or cannot be supported having regard to the evidence" (see **Pell v The Queen** [2020] HCA 12, [45]).

[41] A miscarriage of justice may occur when the prosecutor mischaracterizes the accused's defence. If the judge then endorses that erroneous approach in his or her summing up, there may be an error or irregularity in or in relation to the trial (**Russell v R** [2013] VSCA 155). The situation in this appeal is somewhat similar where the speculative explanation of the prosecutor had been endorsed, put to the assessors and acted upon by the learned trial Judge. I take this view despite the benefit the assessors and the learned trial Judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[42] Therefore, I hold that the learned trial Judge's directions to the assessors at paragraph 24 and his own reasoning at paragraph 10 have caused a substantial miscarriage of justice. The next question is what should follow.

[43] Where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome is one of the instances where there is a substantial miscarriage of justice (**Baini v R** (2012) 246 CLR 469; [2012] HCA 59). In some

cases it will be impossible for an appellate court to assess the effect of an irregularity on the outcome of the trial (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Libke v R** (2007) 230 CLR 559; [2007] HCA 30 per Kirby and Callinan JJ).

[44] In **Baini v R** (supra) at [33] it was held 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 of the kind which occurred in this 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.'*

[45] In the two categories under section 276(1) (b) and (c) of Criminal Procedure Act 2009 (Vic), the court may find a substantial miscarriage of justice even if it was *open* to the assessors and the learned trial Judge to *convict* unless the court finds that it was *not open* to the jury to *acquit* (that is, the accused's conviction was inevitable) which may lead the court to conclude that there was not a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59). I cannot find from my review of the record particularly given the serious error discussed above that the conviction was inevitable, in the sense that it was not open to a reasonable assessors or the judge to acquit and therefore, I cannot conclude that there may not have been a substantial miscarriage of justice (see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157).

[46] 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 jury, 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. This recognises that section 276(1) of Criminal Procedure Act 2009 (Vic) only requires the appellant to show that if there had not been an error, the jury might have had a doubt about his or her guilt (**Andelman v R** (2013) 38 VR 659; [2013] VSCA 25). The focus is not on whether the court is itself satisfied that the accused's guilt is established beyond reasonable

doubt (**Andelman v R** (2013) 38 VR 659; [2013] VSCA 25; **Baini v R** (2013) 42 VR 608; [2013] VSCA 157).

[47] In the light of my finding that given the serious error complained of by the appellant the conviction cannot be held to be inevitable, and a substantial miscarriage of justice had occurred the only remaining issue is whether to acquit the appellant or order a new trial.

[48] In **Laojindamanee v State** (supra) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'*

[49] The error resulting in the conviction becoming unsustainable is the speculative explanation advanced by the prosecutor for the answers which were voluntarily given by the complainant exonerating the appellant and which was subsequently presented to the assessors and acted upon up by the learned trial Judge making it a grave error causing a substantial miscarriage of justice. In the circumstances, it would be unfair by the appellant who at the age of 22 was a first time offender and has faced criminal proceedings since 2014 and already served 04 years and 09 months in prison, to be tried afresh allowing the respondent to have a second bite of the cherry in the conduct of the prosecution. It would also be unfair by the complainant who is supposed to be a slow learner to be asked to relive her story once again where at the new trial she would invariably be confronted with her answers exculpatory of the appellant in the concluded trial.

[50] Therefore, the appellant's appeal should be allowed and accordingly the conviction should be set aside in terms of section 23(1) of the Court of Appeal Act.

[51] I have already dealt with matters submitted under the 02nd ground of appeal as both are intertwined and there is no need to consider it separately. The 03rd and 04th grounds of appeal are unmeritorious as on the totality of evidence there is no serious issue on the appellant's identification. The learned trial Judge had directed the assessors of the appellant's cautioned interview in the summing-up at paragraphs 20 and 21 and given the fact that the appellant had put himself at the crime scene in his cautioned interview which he repeated under oath at the trial though in both instances denying the act of penetration, the directions at paragraph 21 is adequate. I do not find sufficient merits in the 05th ground of appeal. Accordingly, no enlargement of time is granted in respect of 03rd to 05th grounds of appeal.

Bandara, JA

[52] I have read the draft judgment of Prematilaka JA and agree with his reasoning and conclusions.

Rajasinghe, JA

[53] I agree with the reasons and conclusions in the draft judgment of Prematilaka JA.

Orders

1. Appeal allowed.
2. Conviction set aside.
3. Appellant acquitted.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL