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

**CRIMINAL APPEAL NO. AAU 116 OF 2019**
**AAU 139 OF 2019**
**[Labasa Criminal Action No: HAC 30/2017]**

**BETWEEN** : **TAITUSI MANUCA**
**JONE COLATA**

***Appellants***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Prematilaka, RJA**
**Qetaki, JA**
**Clark, JA**

**Counsel** : **Mr. M. Fesaitu and Ms. K. Vulimainadave for the Appellant**
**Mr. Kumar for the Respondent**

**Date of Hearing** : **9 February 2024**

**Date of Judgment** : **28 February 2024**

# JUDGMENT

**Prematilaka, RJA**

[1] I have read on draft the judgment of Qetaki, JA and agree in his reasons and conclusions.

**Qetaki, JA**

**Background**

[2] The appellants were indicted in the High Court at Labasa with one Count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009 and one Count of sexual assault contrary to section 210 (1) (a) of the Crimes Act 2009 committed at Taveuni in the Northern Division on 8 July 2017.

[3] In relation to Count 1, the particulars of Offence alleged for both the appellants that *"on 8 July, 2017, at Taveuni, in the Northern Division, penetrated the vagina of* ***SB.,*** *with his penis, without her consent."*

[4] In relation to Count 2, the particulars of Offence alleged *"on 8 July210, at Taveuni, in the Norther Division. Unlawfully and indecently assaulted SB., by masturbating her genitalia."*

[5] At the end of the summing-up the assessors had unanimously opined that both the appellants were guilty as charged. The learned trial judge agreed with the assessors' opinion, convicted the first appellant and sentenced him on 03 August 2018 to an imprisonment term of 14 years (after the remand period was deducted the sentence is 13 years and 9 months) for rape and 7 years of imprisonment for sexual assault; both sentences to run concurrently with a non-parole period for 10 years. The second appellant was convicted and sentenced to an imprisonment term of 14 years (after the remand period was deducted and discount given for good behavior the sentence is 12 years and 06 months) each for two counts of rape; both sentences to run concurrently with a non-parole period of 09 years.

[6] The first appellant in person appealed against conviction on 30 July 2019, and filed submissions on 27 February 2020. He filed additional grounds of appeal on 15 September 2020. He filed an appeal against sentence on 22 February 2021. Legal Aid Commission also filed an affidavit and written submissions in support of a notice of motion seeking an

extension of time to appeal against conviction and sentence. The respondent's written submission had been filed on 06 October 2021.

[7] The second appellant in person appealed against conviction on 11 September 2019 and filed additional grounds of appeal on 15 September 2020. On 22 February 2021 the Legal Aid Commission filed an affidavit and written submissions in support of a notice of motion seeking an extension of time to appeal against conviction and sentence.

[8] The respondent's written submissions had been filed on 06 October 2021. At the hearing both the appellants were represented by the Legal Aid Commission (LAC).

[9] The appellants' application for enhancement of time to appeal against conviction was allowed by the learned single judge. Their application for enhancement of time against sentence was refused.

**Facts**

[10] These facts are reproduced from the judgment of the learned trial judge at pages 94 and 95 of the record:

> *"3. The evidence adduced by the State came from the complainant (referred to herein as ''Mrs. B') and her husband (Mr. B). They are a New Zealand couple who moved to Taveuni in May 2017 to start a business.*
>
> *4. On the 7th of June they went to a local beach in the evening to relax and drink some beer they had taken with them. They were joined by the two accused and their girlfriends and beer and cigarettes were shared until about midnight. Eventually the NZ couple and the two accused ended their 'drinking session' at another popular drinking spot known as the Korean wharf. The girlfriends had long before gone home. A bottle of rum was bought and consumed by all four at the Korean wharf.*
>
> *5. At about 4am Mrs. B. had had enough and went to recline on the front passenger seat of their twin cab vehicle. She fell asleep and woke to find the first accused on top of her kissing her and penetrating her. She knew that it was not her husband and could recognize the body type and voice of the first accused. Apart from raping her he also sexually assaulted her with his hand*

*and tongue. The second accused was standing outside by the open passenger door talking to the first accused whilst he was assaulting Mrs. B.*

6. *When the first accused was finished the two men changed places and the second accused proceeded to rape Mrs. B with both his finger and his penis while biting her face and neck.*

7. *Whilst these assaults were occurring Mr. B was nowhere to be seen or heard, but later when he returned, he was suffering from memory loss and confusion.*

8. *At dawn Mr. B (not knowing what had occurred) drove the two accused to town and dropped them both off. It was only at this stage that Mrs. B was able to tell her husband of the ordeal she had been through. The Police were immediately informed and medical examinations conducted at the Taveuni District hospital. A lady Medical Officer told the Court the Mr. was found to have a head wound on his scalp with fresh blood; a wound consistent with blunt force trauma within the previous 12 hours.*

9. *Both accused persons gave evidence in their defence, and both claimed to know nothing about assaults; each was asleep after so much beer and rum and if anything had happened to Mrs. B it could not have been either of them because they were sleeping.*

10. *Each accused called a witness to support the defence neither of whom were any assistance to the accused calling that evidence."*

[11] **Grounds of Appeal**

**Ground 1**
*That the learned trial judge had erred in law and in facts having not directed the assessors and himself on the Turnbull directions to assess and/evaluate the correctness of identification as the appellant had denied the allegations of rape.*

**Ground 2**
*That the learned trial judge had erred in law and in facts having not directed the assessors and himself on how to approach the evidence of recent complaint.*

**The Law**

[12] Section 22 of the Court of Appeal Act ("*the Act"*) sets out the jurisdiction of the Court of Appeal on *Appeals from [High Court] in its appellate etc. Jurisdiction in criminal cases,* Subsection (6) of section 22 states:

*"(6) On any appeal brought under this section, the Court of Appeal may notwithstanding that it may be of the opinion that the point raised in the*

*appeal might be decided in favor of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred."*

[13] Section 23 regulates the determination of appeal in ordinary cases. Section 23 (1)(a) states:

*(1) The Court of Appeal-*

*(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there is a miscarriage of justice, and in any other case shall dismiss the appeal; and*

*(b) on any such appeal against acquittal……………………;*
*Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.*

*(2) Subject to the provisions of this Act, the Court of Appeal shall-*
*(a) if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial; and*
*(b)……………………………………………. etc.* (Underlining added)

**Full Court**

**Appellants' Case-Ground 1**

[14] The appellant's submissions may be summerised as follows:

(a) The learned trial judge erred in law and in fact as in summing up he did not direct the assessors and himself on the Turnbull directions to assess and evaluate the correctness of the identification as the appellants had denied the allegations of rape.

(b) The complainant's evidence as stated in the summing up at paragraphs 21 to 24 (pages 103-104 of the court record) appears to be that of no facial identification but identification of the alleged perpetrators based on the voice and distinct body shape and odor. The complainant's evidence as to the description on the voices and body shapes is noted in the court record [pages 212 to 214].

(c) The evidences regarding the surrounding circumstances may have a bearing on the accuracy of the complainant having positively identifying the persons said to have committed the acts. It was in the early hours of the morning on the day in question, the level of intoxication of the complainant, the position she was in the vehicle, no certainty on the strength of the lighting, the music was playing from the vehicle radio, and the noise level from other groups drinking within the vicinity, a popular drinking spot.

(d) The appellants submitted that this may be a case of recognition rather than identification.

(e) It may not be disputed that the appellants and the complainant and her husband were together for about eight hours having first met at Dennis Park on the evening of 7th July 2017 until the early morning on the following day 8th of July.

(f) Under the circumstances it was still incumbent on the learned trial judge to have directed the assessors on the Turnbull guidelines. The following cases/authorities were cited in support of this submission: **Savu v State** [2014] FJCA 208; AAU0090.2012 (5 December 2014); **Tubuduadua** v **State** [2022] FJCA AAU120.2016 (26 May 2022; **Archbold 2020-Criminal Pleadings Evidence & Practice** at page 1860 and 1861; **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020).

(g) The Turnbull guidelines require that that special caution ought to have been directed to the assessors before the assessors could convict on such evidences. This, quite apart from the factors required to be considered by the guideline when assessing the identification or recognition of the appellants.

(h) In **Mateni v State** (supra) this Court had dealt with a similar complaint on the failure of the trial judge to have directed the assessors and himself on the Turnbull guidelines.

(i) That the learned judge does not seem to have assessed the correctness of the identification in line with the Turnbull principles in the judgment as noted at paragraph [11] to [15] of the judgment (pages 96 and 97 of the appeal record).

(j) A substantial miscarriage of justice has occurred due to this failure by the learned trial judge to have directed the assessors and himself on the correctness of the identification of the appellants said to have committed the allegations on the complainant.

**Appellants' Case Ground 2**

[15] The appellants alleged that the learned trial judge had erred in law and in facts having not directed the assessors and himself on how to approach the evidence of recent complaint as:

(a) What was relayed to the husband by the complainant cannot be treated as evidence of facts complained nor is it corroboration: **Anand Abhay Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). In discussing recent complain evidence the Supreme Court stated:

*'[33] In any case evidence of recent complaint was never capable of corroborating the complainants 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: **Bassant Singh & Others v The State** Crim. App. 12 of 1989; **Jones v The Queen** [1977] HCA 12; (1997) 191 CLR 439; **Vasu v The State** Crim. App. AAU0011/2006S, 24 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…'*

(c) There is no direction in the summing up in which the assessors were assisted on how to approach recent complaint evidences although there is an evidential basis for calling for such direction. The complainant in her evidence had stated that, after the appellants were dropped off the vehicle, she informed her husband that the appellants had raped her - (page 219 of court record). The husband in his evidence had similarly testified that he was informed by the complainant (page 235 of the court record).

(d) The judgment does not indicate any consideration or evaluation on recent complaint evidences. The learned judges finding at paragraph 15 of the judgment (page 97 of record) confirms that their evidence alone proves the prosecution case to the required standard:

*'Both Mr. and Mrs. were frank and honest witnesses and endeavored to tell the Court all the detail that they could recall and I believed them. Their evidence alone proved the prosecution case to the required standard.'*

(d) It can be argued that the finding of the learned trial judge may suggest that he had treated the recent complain evidence as corroborative of the complainant's account as to the rape allegations when the law on recent complaint as discussed in **Anand Abhay Raj v State** (supra) sates otherwise.

It is a serious misdirection though not expressly stated as adverted to in the judgment.

(e) The effect of the husband's evidence as a whole is relevant only to the recent complaint. There is not much probative value to be taken from his evidences to bolster prosecution's case regarding the alleged acts. He had difficulties remembering things when testifying at the trial as to what happened at the Korean wharf. He was heavily intoxicated on the day in question.

**Substantial Miscarriage of Justice**

[16] In the context of the two appeal grounds urged which relate to non-directions in summing up, the appellants submit that the test is whether there is a substantial miscarriage of justice. This Court in **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) had stated:

> *'Thus for grounds alleging substantial miscarriage of justice,* ***Baini v R*** *(2012) 246 CLR 469 , [2012] HCA 59)seems to suggest a slightly different test of the guilty verdict or conviction being 'inevitable to be concluded by appellate court from its review of the record' as opposed to the guilty verdict or conviction being one that is 'open to the assessors to be satisfied beyond reasonable doubt on the whole of evidence' which is applicable to grounds based on unreasonable or cannot be supported having regard to the evidence':*
> *'.... 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 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.'*

[17] The appellants submit that it is difficult to say whether the conviction is inevitable had there been directions given on Turnbull guidelines and recent complaint. The prosecution's case rests substantially on the complainant's own evidence, and with her evidence placed aside, there is no other credible evidences sufficient to sustain a conviction.

[18] The appeal against conviction, it is submitted, be allowed.

**Respondent's Reply - Ground 1**

[19] The respondent accepted that:

(a) There is some substance in this ground of appeal properly raised by the appellants. But submits that the complainant had firmly identified the appellants as the perpetrators of the act against the complainant.

(b) For context, the complainant's evidence (paragraph 19 to 24 of Summing up) shows that whilst there was no facial identification (the classical Turnbull scenario) both of the appellants were identified as being the rape perpetrators by the complainant due to her having been sure of their respective voices (despite having met and spent time with them, together with her husband, for the first time in Taveuni) and differentiating the1st appellant (who was the first accused at trial ) from the 2nd appellant through body type and the 2nd appellant had a distinctive body odor.

(c) Whilst this does not affect the complainant's credibility (as she said she had pretended to be asleep during the ordeal which explains the lack of facial identification) it does bring into sharp focus a lack of direction to the lay assessors as to how they had to carefully approach identification evidence in the context of the raised defences.

(d) That **Tubuduadua v State** (supra) is relevant where this Court dismissed an appeal against conviction. The learned trial judge had provided directions on the aspect of voice identification but, the circumstance in this appeal is different due to the lack or absence of any similar directions to the assessors. Considering **Tubuduadua** with the case **Kishore v State** AAU0085 of 2016 (26 may 2022), it appears that this Court would need to consider whether, given the absence of the relevant directions, could the proviso have applied in this matter upon an examination of the whole of the material on record. In **Tubuduadua**, it was observed:

'*[24] Therefore, despite the apparent inadequacy of the directions on voice identification by the trial judge, I do not think that the deficiency would have caused substantial miscarriage of justice. I have dealt with in detail as to how the appellate courts would deal with misdirection, non-direction, omission or inadequate directions in* ***Kishore v The State*** *AAU oo5 of 2016 (26 May 2022) and could only repeat my conclusion reached therein in so far as this appeal is concerned.*

*[23] ......However, of the whole of the material on record, I cannot conclude that the omissions highlighted by the appellant are so significant that the assessors and the trial judge notwithstanding the advantage of having seen and heard SL and her mother ought to have entertained a reasonable doubt of their truthfulness, reliability and credibility. In my view any reasonable fact finders properly directed on the alleged*

*omissions would, on the whole of the evidence, without doubt have convicted the appellant. To me the conviction was inevitable based on the written record of the trial. Thus, there is no miscarriage of justice by reason of the verdict being unreasonable or not supported by evidence. Therefore, there is no necessity to invoke the proviso to section 23(1) of the Court of Appeal Act. However, I am of the view that had it been necessary to consider the proviso the conclusion that there had been no substantial miscarriage of justice would have been open the Court.'*

(e) In light of the above, appellants submit this is a case where the full Court would need to consider whether, given the absence of relevant directions, could the proviso be properly applied in this matter upon an examination of the whole of the material on record. As the convictions could stand based on the complainant's evidence alone, an examination of the trial transcripts, in particular from pages 200 to 232 (Complainant Mrs. Briscoe's evidence) it can be reasonably concluded that the complainant was sure that her rapists had been 1st and 2nd appellants respectively as she had spent the evening in their company, with her husband and two other ladies.

(f) While the events prior to the rapes had been happy, the complainant was obviously a reasonable and honest witness who had said in cross examination that both appellants had been respectful before the offending. In cross-examination her true quality of her identification came out as she said that while she pretends to be asleep, she had seen the appellants take turns with her, heard them during the ordeal calling her name, conversing with each other perhaps in iTaukei language and knew which perpetrator was which by differentiating the 1st appellant from the 2nd due to body type while the 2nd appellant had a particularly bad body odor.

(g) These specific memory markers made the complainant appear an honest, forthright and wholly credible witness, the complainant had accepted taking drink and rejected suggestions she had been mistaken in her respective identification.

(h) It is submitted that based on her evidence alone, which was robustly tested under vigouress cross-examination by two separate legal counsel, which remained consistent, the convictions against 1st and 2nd appellants were inevitable.

(i) Counsel quoted from paragraphs 11 to16 of the judgment of the learned trial judge and concluded that, the learned judge after having seen and heard the witnesses had transparently reasoned his findings of guilt, in a simple and straightforward manner. He properly accepted the complainant's unimpeached evidence and rejected the appellant versions.

(j) There was no miscarriage of justice when both appellants were found guilty as charged and were convicted, based on such sure and tested evidence of the complainant.

**Respondent's Reply - Ground 2**

[20] The respondent accepted:

(a) There were no directions to lay assessors as to weight they were to give to the evidence of recent complaint as by the complainant's husband.

(b) Admitted that proper recent complaint directions would have been ideal, and absence of such directions per se would not be sufficient to assail convictions or declare the trial to have been unfair and thereby having caused any substantial miscarriage of justice.

(c) In law, there is no corroboration required in such matters and both the convictions remain solid based on the complainant' evidence alone.

(d) It is accepted that proper recent complaint directions may have been ideal, however, an absence of the directions *per se* would not be sufficient to assail convictions or declare the trial to have been unfair and thereby having caused any substantial miscarriage of justice.

(e) Arguably if anything, recent complaint direction may have made the complainant appear more reliable to lay assessors while in the absence of the same *albeit* irregular, is not at all fatal in the judgment of the learned trial judge in having found both appellants guilty as charged, more so, based on the complainant's direct and unshaken evidence.

(f) In conclusion there was no miscarriage of justice had actually occurred when the two appellants were inevitably found guilty as charged for having opportunistically raped the trusting and unsuspecting complainant during the early hours of 8 July 2017 at Taveuni while her husband had been knocked out unawares as to what ordeal had befallen his wife.

(g) The appeals against conviction may be properly dismissed in light of the sure and conclusively tested evidence of the complainant as contained in pages 200 to 232 of the court record.

**Analysis**

[21] In **Ground 1** the appellants are challenging the learned trial judge's findings on the identification of the two accused persons (appellants) by accepting the complainant' voice identification evidence. It is not disputed that the learned trial judge did not direct the

assessors and himself on the Turnbull directions to assess and or evaluate the correctness of identification. It is also true that the appellants had denied the allegations of rape.

[22] Essentially, the ground challenges the voice identification, and the veracity of the complainant's identification evidence of the appellants, leading to their conviction, without the Turnbull directions to assist the assessors. Such direction would in appropriate cases guide the assessors in evaluating the correctness of the identification. The challenge gives rise to some basic questions on the legal principles that apply in such situation: Whether in the circumstances of this case a Turnbull direction would have been appropriate? Does the absence of the Turnbull directions pose a disadvantage to the appellants in this case causing a substantial miscarriage of justice?

[23] The learned trial judge believed the complainant and her husband and disbelieved the appellants. In paragraphs 15 and 16 of the Judgment the learned trial judge stated:

> *'Both Mr. and Mrs. B were frank and honest witnesses and endeavored to tell the Court all the details that they could recall and I believed them. Their evidence alone proved the prosecution case to the required standard.'* (Underlining added) .I agree with the finding of the learned trial judge having carefully considered the trial record.

[24] A careful examination and analysis of the evidence of the complainant is essential as the assessors and the learned trial judge accepted her evidence without the benefit of a Turnbull direction. Is that fatal in this case?

[25] Some selected excerpts from the complainant's examination in chief are highlighted below in order to assess the quality of the complainant's identification in her evidence on the material events.

[26] At pages 210 and 211 of the record, during examination in chief of the complainant, when they arrived at the wharf (crime scene). Complainant's evidence is, there was no one around at the wharf, she described where her husband was and the two boys -they were at the back. Vehicle door was open, music was playing and drinking continued. They were

drinking from the bottle cap, which was passed round. She said she has had enough drinks and wanted to rest; Joe wanted to lay down at back of vehicle. Husband and Tai were at the back tray of the boot:

***"Ms. Vavadakua: When you reached the wharf were there any other people at the wharf?***
***Ms. Brisco: No there weren't.***
***Ms. Vavadakua: On your way to the wharf were there any conversation with you and the boys.***
***Ms. Brisco: There was, general conversation but certainly nothing that stood out-if I am honest to be very peace in the evening, we felt friendship with these people that we met so.***
***…………………………………………………………….***
***Ms. Vavadakua: What happened when you got out off the water?***
***Ms. Brisco: Well, they-my husband and two boys were sitting on the back of the truck-the doors were open and the stereo was going. We were playing some music from my phone through the stereo of the car-they were still drinking rum I think there was still rum left and they were drinking and out of there was small-from reflection and they were drinking from the cap of the-bottle and passing it around, now I remember being passed to me.***
***…………………………………………………………….***
***Judge: They drank from the cap.***
***Ms. Brisco: I was also drinking that long-I remember objecting on several occasion so and saying look you know I had enough-I can't drink anymore and at that point-I said to my husband-not privately I said look up you know I had enough now, I am going to come, have lay down in the car and I dropped in at the passenger seat of the car and left the passenger door open.***
***Judge: Sat on the passenger seat with door open.***
***Ms. Brisco: Yes.***
***Ms. Vavadakua: And then what happened?***

***Ms. Briscoe. The music was still playing at this point-I believe Jone maybe got into the back right and rear vehicle seat for lay down.***

***………………………………………………………….***

***Ms. Vavadakua: How do you know it was Jone?***

***Ms. Brisco: I saw him. I saw him and remember him saying-I will go and sit down as well. -because everybody was getting pretty drunk by this point.***

***Ms. Vavadakua: At that time Jone got into the vehicle-where was your husband and Tai.***

***Ms. Brisco: He was only up- he was on the back tray of the boot.***

***Judge: With Taitusi.***

***MsBrisco: Correct.***

[27] At page 212 of record. Complainant stated she fell asleep, she felt a body on top of her, a man was penetrating her, she realized it was not her husband. It wasn't her husband's body. The man was getting into her under pant:

***Ms. Vavadakua: And then what happened?***

***Ms. Brisco: -then I-I fell asleep and when- when I overlook, I felt a- a body on top of me. A man's body on top of me-into penetrate me and-my face too because I had bunch of drink-was- perhaps was my husband and I reached off to-and the minute I touch this person I-I realise that wasn't my husband's body.***

***Judge: Did you say this man was penetrating me.***

***Ms. Brisco: He was getting into-the under pants has been pulled to one side and I was been kissed on my- my neck and my mouth."***

[28] At page 213 of record, complainant's evidence, showed and demonstrated her awareness of what was happening, conscious it was not her husband on top of her body, she was afraid and fearful of what might happen to her husband as she could not hear his voice, and she identified Tai (first appellant) and aware that Jone (second appellant) had moved from the back seat of the vehicle to station himself by Tai who was assaulting her sexually. Complainant identified both Tai and Jone and described vividly their body shapes/type

and voices which differentiate each from the other, their smell/odor were not the same. Complainant described the distinctive features of each appellant:

***"Ms. Vavadakua: What did you do after you realized that it was not your husband?***
***Ms. Brisco: Uh-I wasn't quite sure how to deal with that because-obviously I was quite confused-as to why this might be happening was my husband was present but I couldn't hear my husband's voice or see him anywhere-so I felt to do nothing. I was frightened of what may have happened to my husband, I didn't release, scream out or do anything like that-I almost continue to pretend that I was still asleep or unconscious.***
***Judge: If it wasn't your husband-we all aware that there was Taitusi or Jone.***
***Ms. Brisco: I was aware that it was Tai.***
***Judge: Did you know Jone was still at the back seat.***
***Ms. Brisco: I could hear Jone standing on my left talking to Tai.***
***Judge: Jone standing outside the vehicle.***
***Ms. Brisco: Outside the vehicle. One of my legs was outside of the passenger seat and my legs been departed and Tai was in between my legs and Jone was to my left and they were conversing with each other and also talking to-***
***………………………………………………………….***
***Ms. Vavadakua: How do you know that it was Tai?***
***Ms. Brisco: Uh-the two men have every different body shape and also different voices and I speak the night with both of them and I was pretty familiar with their-their voices-they would be no mistake in the feel of one's body for another because one was very big, large built and one was very small built at that time. There was also- a body odor from-from one of them a very strong body odor that I noticed from still the evening and so that also but- they were talking to me. They were saying my-* "**

[29] At page 214 of record. Complainant described what appellants were saying, clarified body odor, body type, voice, continuous sexual assault by appellants. Complainant could not fully comprehend what appellants continue to tell her, but hears and recognizes their voices:

***"Ms. Vavadakua: What they were saying?***

***Ms. Brisco: They were saying my name. They were saying Shannon. I can't remember the exact words but they weren't reference the way that I-***

***Judge: Which one has the body odor?***

***Ms. Brisco: Joe.***

***Judge: and with reference to that-what you said that the identification match the man between your legs.***

***Ms. Brisco: The-the size of his body and the fact that he was talking to me. I recognize his voice.***

***Judge: That there was no body odor coming from the man on top of you.***

***Ms. Brisco: No that's right. Well, a different one I suppose. Not the stinky.***

***Ms. Vavadakua: And this Tai-what did he do. What exactly did he do?***

***Ms. Brisco: I can't remain the way exact order of things but there was masturbation with hand also.***

***Judge: Doing on you or themselves?***

***Ms. Brisco: Uh-me and with his mouth.***

***Vavadakua: What did he do with his mouth?***

***Ms. Brisco-He put his tongue in-in around my vagina.***

***Ms. Vavadakua: You tell us he was masturbating you-you tell us what you mean."***

[30] At page 215 of record. Complainant describes the continuing sexual assault on her by both appellants. Appellants take turns in sexually assaulting her (raping her). Complainant recognized appellants voices while they were talking to her while committing rape:

***"Ms. Brisco: Uh he-he was touching my vagina and my breasts and my thighs and he was putting his fingers my vagina and his tongue.***

***Ms. Vavadakua: After he did this than what else did he do.***

***Ms. Brisco: He ejaculated-on my vagina around-on my things and in- he step aside and then Jone did officially the same things-***

***…………………………………………………***

***Ms. Vavadakua: What did Jone do?***

***Ms. Brisco: He-masturbate on my vagina and he pull his mouth away and he-he put his penis to my vagina and he kissed me and they both kiss my mouth and my neck and then they did my lips.***

***Judge: Did you say Jone put his penis in your vagina and Tai done that as well.***

***Ms. Brisco: He had.***

***Judge: Both had penetrated you.***

***Ms. Brisco: Yes.***

***Ms. Vavadakua: How do you know it was Jone?***

***Ms. Brisco: Because of the-I could hear them talking and because of the change in body and the change in smell.***

***Judge: You mean so Joe had a completely different body tone.***

***Ms. Brisco: Correct.***

***Ms. Vavadakua: You recognize their voices?***

***Ms. Brisco: I did. They were both talking to me throughout the act.***

***Ms. Vavadakua: What was Jone saying?***

***Brisco: I can't remember the exact words again it was a reference to the way that I looked and the way-and the color of my skin and that was not thank you, that was not uh violent or nasty, it was almost gentle and I don't know the word. To you is uh- it was almost like he would talk to somebody if they would be consenting to it."***

[31] At page 216 of record. Complainant said she could not tell exactly what complainant were saying, that she was not unconscious, she was conscious but pretended not to be. Appellants were taking turns on her, while music was on and loud.

***"Judge: I am sorry you have to go through this but we need to have this information for this case.***

***Ms. Brisco: I understand so yeah, I could-I couldn't tell you exactly what was said but it was almost loving time if you understand what I mean. You know lovely or that sort of things. You know.***

***Ms. Vavadakua: And at that time, you also may uh-emotionless. You didn't do anything.***

***Ms. Brisco: Completely.***

***Judge: So, you didn't do anything. You were unconscious.***

***Ms. Brisco: I remain.***

***Ms. Vavadakua: Not unconscious you just like-***

***Ms. Brisco: Yeah-I believe that consciousness came and went for-towards the great but-the time I was conscious I pretended not to be.***

***Ms. Vavadakua: And after Jone had done this to you then what happened next?***

***Ms. Brisco: Then my recollection Tai took Joes place again-the music was still playing and every time a song stopped I felt one or either of them reach across and take my phone and play another song to-turn the volume up so-***

***Ms. Vavadakua: And then you said Tai took his place again."***

[32] At page 217 Complainant said Tai came for the second time. Sexual assault continued by both appellants, then she heard her husband's voice coming from the far right of the vehicle.

***"Ms. Brisco; Yes That-That's man standing.***

***Ms. Vavadakua: What did Tai do the second time?***

***Ms. Brisco: Uh-penetration with his penis-I believe-***

***Judge: You have been penetrated with what else after from penis.***

***Ms. Brisco: Uh-finger and tongue.***

***Judge: Finger who-who penetrated you with finger.***

***Ms Briscoe: Uh-both both of them.***

***Judge: Finger penetration by both.***

***Ms. Vavadakua: And Ms. Brisco after this-Ms. Brisco sorry-after Joe had finished than what happened.***

***Ms. Brisco: It was while they were still continuing with, I heard my husband's voice again coming from the far righ of the vehicle and I just saw, they go-you know because I don't really know where he was. Jone-***

***Judge: So, all this time when this assault was going on because of sexually abuse he-your husband was nowhere to be seen.***

***Ms. Brisco: He was nowhere to be seen."***

[33] At page 218 of record. Complainant said the appellants quickly pulled my clothes back down, and re-arrange when they heard husband's voice. They adjusted complainant's leg position. Appellants leave immediately.

***"Ms. Vavadakua: What were the two doing when heard your husband's voice.***
***Ms. Brisco: They were in their act still and what they did was that heard my husband's voice and they quickly-pulled my clothes back down and re-arrange.***
***Judge: They heard my husband and leave immediately, is it immediately or***
***Ms. Brisco: Immediately.***
***Judge: Immediately adjusted my clothing.***
***Ms. Brisco: Put- one of my legs was outside of the vehicle-they lifted my leg and put it back and closed my legs together."***

[34] At page 222 of the record, is the dock identification of the appellants by the complainant. She commented on Taitusi's change in appearance.

***"Ms. Vavadakua: Thing to do-Ms. Thank you Ms Briscoe now the persons that you mentioned Mr. Tai- if you saw him again would you be able to recognize him.***
***Ms. Brisco: Yes.***
***Ms. Vavadakua: And what about Joe.***
***Ms. Brisco: Yes.***
***Judge: Put the screen down please.***
***Ms. Vavadakua: I am going to ask you if you could please look around the room and please tell us whether Tai is here today or not. If he is could you please point to where he is?***
***Ms. Brisco: His on the right.***
***Judge: That's Taitusi in the purplish shirt.***
***Ms. Brisco: Yes***
***Judge: Purple colored shirt.***
***Ms. Brisco: Yes, although his appearance has-has changed-***

[35] At page 223 of record. Complainant's dock identification continues. Complainant said that Taitusi had gained weight in his face. Joe was identified.

***Judge: In what way.***

***Ms Briscoe: Uh-his gained weight in his face.***

***Judge: Very well Accused has been identified-so 1st accused Taitusi identified, who's the other man.***

***Ms. Brisco: Uh-Jo is on the left.***

***Judge: So, second accused Jone also identified. Put the screen back.***

[36] At page 227 of record, on cross-examination in chief by the two counsel acting for the appellants, complainant was firm and clear in her answers on how she identified the appellants. Here the complainant was describing how she is able to identify the appellants, including that she had now become familiar with their voices, being with them the whole of the evening.

***"Mr. Korotini: How were you able to identify?***

***Ms. Brisco: Well like I said I saw them; I smelled them and I felt them and I recognized their voices. I had speak the whole evening with them and I was now familiar with their voices."***

[37] At page 230 of record, on cross-examination in chief by Mr. Boseiwaqa: Complainant explained how she identified the appellants, including that appellants called her by her name.

***"Mr. Boseiwaqa: And you said in your evidence you could only feel the shape of their bodies on top of you. Correct?***

***Ms. Brisco: No, I could feel them, I could smell them and I did see them also and could hear them. So, there was the number of things that lead me to identify them and the fact that they called me by my name constantly throughout the act."***

[38] Both counsel agreed that **Tubuduadua v State** (supra) is the authority in Fiji on the standards and principles applicable to the identification of perpetrators of crime where there is no direct facial identification of an accused person. However, the counsel differ

on the proper application of the principles to this case, and on the effects of applying the Turnbull principles.

**Tubuduadua,** can be distinguished from this case on the facts and also because in that case, a direction was issued to the assessors although it was not a complete direction, which was challenged on appeal. The facts are similar in that the learned trial judge relied substantially on the evidence of the complainant, a mother of three children. The learned trial judge had directed on the Turnbull guidelines but it was alleged that the learned judge erred in law '*(a) By not directing the assessors adequately and properly on the weakness of the identification before the [assessors] could act upon it. (b) By not directing the assessors as to why there is a need for special caution and why it is given. Failure to do so denied the Appellant a fair trial.'*

[39] The Turnbull guidelines/directions when administered are to assist the assessors and the trial judges in assessing and evaluating the evidences tendered in trial initially in cases where there is no facial identification of accused person and the identification of the accused is disputed at the trial. The application of the test has been extended to also cover disputed voice identification cases, and has been a guide also in other modes of identification, when disputed.

[40] In this case, as the evidence shows the complainant had identified the appellants, not only in their voices, which is now challenged, but other means or modes also, through the human senses. It is evident that the complainant saw the appellants. She identified or recognized them by their odor or body smell, body type/size, and voice. In the circumstances, the complainant's identification of the appellants is more certain, secure reliable and risk-free, noting that the learned trial judge and the assessors and counsel have been limited to assessing and evaluating voice identification only, of the appellants by the complainant.

[41] In **R v Turnbull** [1977] 63 Criminal Appeal R.132, the English Court of Appeal enunciated guidelines to assess the quality of disputed visual identification or recognition at page 137 of the judgment, as follows:

*"First, whatever the case against the accused depends wholly or substantially on one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury on the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provide this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the judges should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance...Finally he should remind the jury of any specific weakness which had appeared in the identification evidence."*

[42] The Turnbull guidelines apply to both disputed visual identification and disputed voice identification. The principles have been adopted in Fiji. In **Savu v State,** it was held:

"*[7] The Turnbull guideline have been accepted as the law if Fiji (**Semisi Wainiqolo v The State,** unreported Criminal Appeal No. AAU0027 of 2006; 24 November 2006 at 9, **Measke Sinu v The State**, unreported Criminal Appeal No. AAU0037 of 2009, 13 March 2013 at 21)."*

There was no Turnbull guideline direction in this case. That is not fatal to the conviction. There was also strong unchallenged circumstantial evidence indicating that the only people around the crime scene at the material time were the complainant who was in the front passenger seat of the vehicle, the appellants, and Mr. B who was unconscious and not heard of for some time until he regained consciousness awhile later. It was his voice that caused the appellants to cease their unlawful sexual assault and reorganize, as if nothing serious had occurred.

[43] In **Tubuduadua v State**(supra) the President of the Court of Appeal sitting as a single judge had to deal with voice recognition evidence and in granting leave to appeal (appeal yet to be heard in full court) stated as follows:

*'[6] The first ground of appeal against conviction relates to the adequacy of the directions on the voice recognition evidence given by the complainant. As the judge noted in his summing-up at paragraph 86 'It is clear that the prosecution has only evidence of identification by voice to connect the accused to the connecting act'. The directions on voice recognition are set out in paragraphs 86 and 87 of the summing up.*

*[7] In **Davis v R** [2004] EWCA Crim.2521 the Court of Appeal noted at paragraph 29:*

*"……we accept that voice identification (or here more precisely recognition) evidence needs to be approached with even greater care that usual identification or recognition evidence. But the general principles governing identification stated in Turnbull apply to both cf e.g., Hersey [1997] EWCA Crim. 3106 (1 December 1997) (1998) Crim. L R 281."*

[44] Gage LJ in **Flynn and St John** [2008] EWCA Crim. 970 said:

*'In all cases in which prosecution rely on voice recognition evidence, whether by listener, or expert, or both, the Judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases."* I agree that voice recognition may require a higher standard of assessment and evaluation. However, as in this case, voice identification is only one means by which the complainant was able to recognize/ identify the appellants.

[45] In **R v Clarence Osbourne** [1992] JLR 452 the Court of Appeal of Jamaica considered a challenge to voice identification evidence. The learned trial judge had reminded the jury of the basis on which the recognition was made. He had pointed to the period both men were acquainted, the nature of their relationship, and the particular speech pattern of the applicant and the opportunities for such knowledge. Carey P (Ag), said:

*'Common sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. <u>But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where</u>*

*perhaps some attributable or feature of his speech capable of identifying him as a participant, forms part of the prosecution case.'* (Underlining added)

[46] **R v Rohan Taylor et al.** (1993) 30 JLR 100 Gordon JA said:

> *"We would add that the directions given must depend on the particular circumstances of the case……*
> *In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when the recognition of the voice occurs, must be such that there were sufficient words used so to make the recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act."*

[47] The cases cited are from Jamaica a Commonwealth jurisdiction and although not binding in Fiji's Courts, they have a persuasive effect. I agree with the principles in the above cases. Hence, the need to focus on the evidence of the complainant, upon whose evidence alone the learned trial judge was able to convict the appellants.

[48] The case **Mateni v State** is more akin to this case where the learned trial judge overlooked to give the Turnbull directions, and the appellant relies on two grounds, namely (i) Non-direction on Turnbull guidelines; and non- direction on *alibi* evidence on how to assess *alibi* evidence. Here it is non-direction on Turnbull guidelines on voice identification, and non-direction on how assessors are to approach recent complaint. In **Mateni,** although the incidents complained of occurred on two successive days, the same complainants who were sisters were involved. However, the quality of the identification was compromised as there was conflicting evidence by the two sisters. A distinction is to be made between a challenges based on disputed identification, from a challenge on the veracity of a witness. In the first, factors that are relevant in assessing the identification include, quality of light, condition whether satisfactory or not, duration of time under observation, noise factor. The nature of the act, where it occurred, the knowledge of the appellants gained over approximately eight hours of continuous close contact, laughter,

drinking and conversations contributed to proper identification of the appellants. They were identified by their voices, their knowledge of the victim, their smell, their body shape/type and the faces. These were sufficient under the circumstances to identify the appellants and distinguish between them.

[49] On the veracity of the complainant as a witness, this speaks to the way she was able to give quality evidence in chief and maintained her consistency and steadfastness when confronted with robust cross-examinations by the two counsel representing the appellants. Her evidence cannot be doubted. She was subjected to rigorous cross-examination by both the appellants counsel and was not shaken. She was consistent, steady and credible.

[50] Ground 1 has no merit. There is no miscarriage of justice.

[51] With respect to **Ground 2** the appellants are challenging the decision of the learned trial judge in not directing the assessors and himself on how to approach the evidence of recent complaint. In other words, how should the assessors approach the evidence of the complainant's husband with respect to the acts allegedly committed by the appellants on his wife the complainant.

[52] The respondent conceded that the trial judge had not provided any assistance to the assessors on how to approach this piece of evidence. The trial judge had not stated what weight he was attaching to the recent complaint evidence though he had referred to it. The danger is that the assessors if not properly directed could be influenced by it as corroboration of complainant's evidence or that it is evidence to be accepted as such. They were not directed as to the weight to be placed on the complainant's husband evidence that she told him immediately she was raped soon after the appellants were dropped off.

[53] In **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) the Court of Appeal dealt with the law relating to recent complaint evidence:

*[28] As a general rule prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence a recent complaint made to another person by the complainant is allowed to show consistency of the conduct of the complainant and to negative consent (Peniasi Senikarawa v The State, unreported Cr App No. CAV0005 of 2004S; 24 March 2006).The relevance of the evidence was explained by the Supreme Court in Anand Abhay Raj v The State unreported Cr App No. CAV0003 of 2014; 20 August 2014 at [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.*

*[29] At trial, the complainant gave evidence that she told her boyfriend that the appellant had raped her shortly after the alleged incident. The complainant's boyfriend gave evidence and confirmed that the complainant made a complaint to him that the appellant had raped her. In paragraph 38 of the summing up, the learned trial judge told the assessors that the evidence of the boyfriend cannot be used to prove the truth of the alleged rape but as evidence of the consistency of the complainants conduct with the story that she told in the witness box. The direction is correct in law. This ground fails."*

[54] Recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to support and enhance the credibility of the complainant. In this case, the husband's evidence cannot be used to prove the truth of the alleged rape, but as evidence of the consistency of the complainant's conduct with the story she told in the witness box. The complainant retold what she told her husband to the Police and Medical staff.

[55] The appellants argue that the finding by the learned trial judge at paragraph 15 at page 97 of record, that *'their evidence alone proved the prosecution case to the required standard,'* suggests that the learned trial judge may have treated the recent complaint evidence as corroborative of the complainant's account as to the rape allegations. If so, it is contrary to **Raj v State** (supra). It amounts to a serious misdirection. The husband's evidence is relevant only to recent complaint.

[56] In law, no corroboration is required in rape cases. The absence of directions as alleged would not be sufficient to disturb the convictions or declare the trail to have been unfair and having caused any substantial miscarriage of justice.

[57] Ground 2 has no merit. There is no miscarriage of justice.

**Facial Identification**

[58] It is evident from the record, that the complainant had actually seen the appellants when committing the alleged offences. In cross-examination of the complainant by the counsel representing the appellants, the responses point categorically to the fact that the complainant had seen the appellants- see pages 227 (cross-examination by counsel for 1st appellant), and 230 (cross-examination by counsel for 2nd appellant, and paragraphs [36] and [37] of this judgment.

**Substantial Miscarriage of Justice**

[59] I have considered the submissions on whether a substantial miscarriage of justice has occurred caused by the accepted facts that the learned trial judge did not direct the assessors on Turnbull guidelines with respect to voice identification, Also, whether a substantial miscarriage of justice occurred when the learned trial judge did not provide directions to the assessors on how to approach evidence of recent complaint, and what weight should be placed on such evidence. The appellants' counsel referred to **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021), which cited **Bainis case** as suggesting a slightly different test of the guilty verdict or conviction being ***'inevitability to be concluded by appellate court from its review of the record.'*** The respondent submitted that it is difficult to say whether the conviction is inevitable had a direction been given on Turnbull guidelines and recent complaint. The prosecution's case rests substantially on the complainant's own evidence, with her evidence placed aside, there is no credible evidence sufficient to sustain a conviction. From a review of the record the error which occurred in this case, in the context of the facts and circumstances of this case, and the evidence of the complainant: see **Kishore v State** and **Tubuduadua** and the

totality of the evidence in this case, I find that the lack of a Turnbull direction did not lead to a substantial miscarriage of justice.

## Conclusion

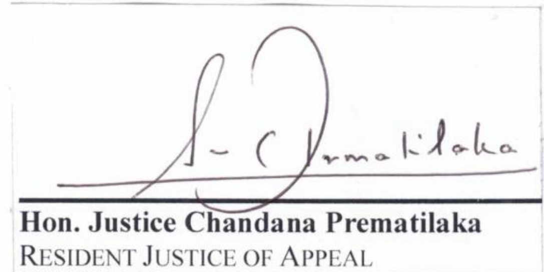
[60] The appeal is dismissed as without merit. Convictions are affirmed.

## Clark, JA

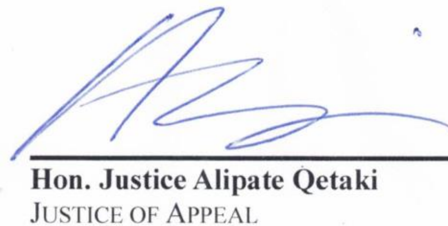
[61] I have read the judgment of His Honour Qetaki J in draft and agree with the conclusions reached, the orders made and the reasoning.

***Orders of Court:***

1. *Appeals dismissed.*
2. *Convictions affirmed.*



**Hon. Justice Chandana Prematilaka**
RESIDENT JUSTICE OF APPEAL



**Hon. Justice Alipate Qetaki**
JUSTICE OF APPEAL

**Hon. Justice Karen Clark**
JUSTICE OF APPEAL