IN THE COURT OF APPEAL, FIJI

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 19 OF 2019

(High Court No. HAC 35 of 2015 Lautoka)

BETWEEN	:	**APAKUKI SAUDROMO**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Mataitoga, RJA** **Qetaki, JA** **Andrews, JA**
Counsel	:	**Appellant in person** **Ms. J. Fatiaki for the Respondent**
Date of Hearing	:	**09 February 2024**
Date of Judgment	:	**28 February 2024**

JUDGMENT

Mataitoga, RJA

[1] The appellant had been indicted in the High Court at Lautoka with one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Lautoka in the Western Division in 2014.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

***INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.*

Particulars of Offence

APAKUKI SAUDROMU** between the 1st day of January, 2014 and the 31st day of January, 2014 at Lautoka in the Western Division, unlawfully and indecently assaulted **"MB".

SECOND COUNT

Statement of Offence

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

Particulars of Offence

APAKUKI SAUDROMU** between the 1st day of September, 2014 and the 30th day of September, 2014 at Yasawa in the Western Division, penetrated the vagina of **"MB"** with his penis, without the consent of **"MB".

[3] The appellant was represented by counsel during the High Court trial. The trial was before a Judge and assessors.

[4] At the end of the summing-up, the assessors had unanimously opined that the appellant **was not guilty of both counts**. The learned trial judge had **disagreed with the assessors**, convicted the appellant of both counts and on 8 November 2018 sentenced him to an aggregate sentence of 14 years, 10 months and 15 days imprisonment with a non-parole period of 12 years.

[5] The appellant had lodged an appeal against conviction a little less than 2 months out of time (04 February 2019). Since then, the appellant had filed amended grounds of appeal from time to time against conviction and canvassed the sentence for the first time on 26 April 2019 which was about 4 ½ months out of time. These grounds of appeal were first submitted to the registry on 03 June 2019 (signed on 26 April 2019). He had lodged an application for bail pending appeal signed on 17 June 2020 (received on 15 July 2020). He informed court on 19 August 2020 that he would rely only on amended grounds of appeal contained in the written submissions signed on 17 June 2020 (received on 15 July 2020) which are the same as those submitted on 3 June 2019 and abandon all other grounds of appeal. He confirmed his position on 30 December 2020 as well. State had filed its written submissions on 18 November 2020 and 31 August 2021. The appellant and counsel for the respondent appeared *via* Skype at the hearing into leave to appeal.

[6] The appellants' appeal lodged in person against conviction would be considered timely as it was within 3 months of the sentence and his sentence appeal would be considered as an application for enlargement of time.

The Appeal

[7] Section 23(1)(a) of the Court of Appeal Act, state that the Court may allow an appeal and set aside the verdict in the High Court trial, if any of the following is established

(i) Verdict is unreasonable, or

(ii) Verdict cannot be supported having regard to the evidence, or

(iii) Verdict based on an error of law, or

(iv) Any ground where there was miscarriage of justice

If the Court of Appeal find any of the grounds above in favor of the appellant, the proviso to section 21(a) the Court of Appeal may still allow the court, to dismiss the appeal if they consider no substantial miscarriage of justice occurred.

[8] At the hearing on 9 February 2024, the appellant was relying on the grounds of appeal advanced during his leave appeal application hearing before the single judge and 6 grounds submitted which was filed in the court registry on 4 December 2023. The Grounds of appeal submitted to the Court on 4 December 2024, consists of two new grounds, the rest were renewed grounds from the leave application.

[9] In exercising the supervisory role of the Court of Appeal when hearing appeals from the High Court, the Supreme Court had stated the following in **Ram v State** [2012] FJSC 125

> "*A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.* "(emphasis added)

Grounds of appeal

[10] The appellant submitted the following grounds of appeal *against conviction*:

> *(i)* *THAT the Learned Trial Judge erred in law when His Lordship stated in (Para 161) of the summing up that, "...whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case...? When in fact the onus was on the prosecution to prove their case beyond reasonable doubt.*
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> *(ii)*
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> *(iii)* *THAT the Learned Trial Judge erred in law when his Lordship stated (Para 81) of the judgment that, "...on the totality of the evidence, the defence has not been able to create a reasonable doubt...", thus implying that the*

burden was on the defence when in fact it was the Prosecutions who bear the burden of proving their case beyond reasonable doubt.

(iv) THAT the Learned Trial Judge verdict was perverse that the accused is guilty on the charge of indecent assault and rape.

(v) THAT the Learned Trial Judge erred in fact when his Lordship accepted the evidence of the complainant as credible when in fact her evidence was vague thus creating doubt to her evidence credibility.

(vi) Incompetent Advocacy.

(vii) Conviction unsafe and unsatisfactory.

Against Sentence

vii. THAT the sentence is harsh and excessive in the circumstance of the case.

viii. THAT the learned erred in not according an appropriate discount as in regards to the accused's mitigation.[1]

[11] On the 6 November 2023 the Appellant submitted further grounds of appeal, filed in the Court Registry 4 December 2023. On close review the new grounds, it is the same as the ones earlier outline above. Before I consider each, I briefly set out a summary of evidence of evidence in the judgement.

Summary of Prosecution Evidence

[12] The trial judge had summarized the evidence of the prosecution as follows in the judgment. The appellant had given evidence, called witnesses and totally denied the charges.

2. 'The brief facts were as follows:

The victim in the year 2014 was 17 years of age and a Form 5 student her father died when she was in class three and her mother remarried. The accused is the paternal uncle of the victim. In January, 2014 the accused after seeking permission from the victim's grandfather took the victim to his house so that he could support her education.

3. After the school started the victim had a boil on her right breast, as a result at night the victim did not wear any top and slept wearing her skirt only. One night whilst sleeping the victim felt someone sucking her breast, when she woke she saw it was the accused her uncle. When the victim saw her uncle she was scared

and nervous he sat on the bed and told her not to tell anyone about what he had done.

4. *The next day the victim told Niko son of the accused and Sivo the baby sitter but they did not do anything. The victim left the house of the accused and went home.*

5. *In September the same year the accused came to the house of the victim and asked the permission of the victim's grandfather so that he could take the victim to Yasawa. The victim's grandfather agreed so the victim accompanied the accused to Yasawa. At Waya Island the victim saw that a hotel was under construction, there were two quarters, in one of them the victim and the accused slept.*

6. *The accused slept on the bed while the victim slept on the mattress on the floor. While sleeping the victim felt someone sitting beside her. When she woke up she saw her uncle. At this time he pushed her down on the mattress and told her to take off her pants.*

7. *The victim took off her pants and so did the accused, who then inserted his penis into the victim's vagina for about three minutes. The victim did not consent to have sexual intercourse with the accused. After having forceful sexual intercourse with the victim the accused went to sleep but the victim did not she cried over what the accused had done to her. The next morning she went home.*

8. *In November of the same year the accused and the victim were at the house of the victim's cousin Inoke, during the night the victim's mother came looking for the victim and took her to the Police Station where the victim told the police everything the accused had done to her. The accused was arrested and charged.*

Assessment of the Grounds of Appeal

[13] Grounds 1 and 2 are considered together because they cover the same claim alleging reverse onus requirement by the judge in his summing up at paragraphs 8, 9, 31, 161, 162 and 163 of the summing-up [Page 142 Court Record] and paragraphs 81 and 83 of the judgment [Page 110 Court Record] and could be dealt with together:

Summing up Page 142 CR

'161. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.'

162. 'If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden

to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

163. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

Judgement – [Page 110 CR]

81. On the totality of the evidence the defence has not been able to create a reasonable doubt in the prosecution case.'

82. This court is satisfied beyond reasonable doubt that for the count of indecent assault the accused between the 1st day of January, 2014 and the 31st day of January, 2014 unlawfully and indecently assaulted the complainant by sucking her breast.

83. Furthermore, this court is also satisfied that the accused between the 1st day of September, 2014 and the 30th day of September, 2014 penetrated the vagina of the complainant with his penis without her consent. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.'

[14] Having reviewed the summing up, it is clear that the directions given by the trial judge as regards the burden and standard of proof required as being beyond reasonable doubt, was for the prosecution throughout the trial. That was correct. The appellant complains that the trial judge had shifted the burden of proof to the appellant when the burden of proof was on the prosecution; that is incorrect. It arose because the statement in the judgement at paragraphs 81-83, was claimed in the appellants grounds of appeal as part of the summing up, which it was not.

[15] The judge's statement in paragraphs 81, 82 and 83 of the Judgement, coming as it is after the appellant was found guilty as charged, had no prejudicial effect on the appellant because all the evidence has been heard and guilty verdict entered against the appellant.

[16] It must be stated for future reference the statement in paragraph 81 should not have been used at all because it is unnecessary and can be confusing.

[17] These grounds of appeal have no merit.

3 and 4 grounds of appeal

[18] Grounds 3 and 4 are considered together because they cover similar issues. The appellant complains that the trial judge's verdict of guilty on both counts is perverse based on paragraph 161 of the summing-up. The link of the claim of perversity to the guilty verdicts and paragraph 161 of the summing up is not clarified with supporting submissions. If the appellant is alleging that the finding of guilt on both charges against him; the rape and sexual assault charges, is perverse because the evidence led at the trial is unreliable and no reasonable person would act on it, that has no relevance to paragraph 161 of summing-up.

[19] What would amount to a perverse finding in a high court trial? In the Supreme Court of India in **Arulvelu & Anr v State [Public Prosecutor]** 2009 AIR SCW 6593, in defining what may be a perverse decision, said:

> *24. We have carefully perused the judgment of the trial court and the impugned judgment of the High Court. The trial court very minutely examined the entire evidence and all documents and exhibits on record. The trial court's analysis of evidence also seems to be correct. The trial court has not deviated from the normal norms or methods of evaluation of the evidence. By no stretch of imagination, we can hold that the judgment of the trial court is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it and consequently the judgment of the trial court is perverse.*
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> *25. We also fail to arrive at the conclusion that the discussion and appreciation of the evidence of the trial court is so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse and the findings rendered by the trial court are against the weight of evidence. The law is well settled that, in an appeal against acquittal, unless the judgment of the trial court is perverse, the Appellate Court would not be justified in substituting its own view and reverse the judgment of acquittal.*

[20] This was a case where both the appellant and the complainant gave directly contradictory evidence regarding the alleged acts of rape and sexual assault i.e. 'word against word' charged against the appellant. All the other witnesses called by the prosecution, relate only to the circumstances surrounding the alleged rape and sexual assault by the appellant. There was no other direct evidence relating to the actual commission of the offences apart from those given by the victim and the appellant. The victim at no stage reported the rape or the sexual assault to anyone. A report was finally made to the police after the appellant's wife confronted the complainant. The other witnesses for the appellant at the trial gave testimony that relate only to background circumstances. In those circumstances the trial judge should be very careful in the directions it gave to the assessors regarding his preference for the evidence of the victim against that of the appellant and how it relates to the burden and standard of proof in the case.

[21] In **Rokocika v State** [2023] FJCA 251, the Court of Appeal in discussing the summing up, stated the following:

> *"In the legal context, stating that the defence has not been able to create any reasonable doubt in the prosecution's case is not inherently wrong or improper. It is a common way to assess the strength of the defence's arguments in court. It does not amount to shifting of burden to an accused.*
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> *[41] In support of his second point, the appellant relies on **Liberato v The Queen** (1985) 159 CLR 507 and submits that the trial judge had failed to give Liberato direction to the assessors.*
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> *[42] It is never appropriate to frame the issue for the jury's determination as one which involves making a choice between conflicting State and defence evidence. The issue is always whether the Crown has proved its case beyond reasonable doubt [see: Haile v R [2022] NSWCCA 71)]. Thus, the trial judge's impugned statement 'Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you' should have been avoided. However, that statement had been made in the context of telling the assessors that it was for them to decide the truthfulness of each witness considering their demeanour as well. It was not a statement where the assessors were given the choice between the evidence of VR and her mother in coming to their conclusion. The trial judge had clearly told the assessors that the prosecution carried the burden to prove the case beyond reasonable doubt (see paragraphs 8, 9, 16, and*

22 of the summing-up). I do not see anything objectionable in the rest of paragraph 72 or 73 (which deals with divisibility of credibility).

[43] Brennan J in his dissenting judgment in Liberato spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the State and said that the jury should be directed that: (a) A preference for the prosecution evidence is not enough — they must not convict unless satisfied beyond reasonable doubt of the truth of that evidence; (b) Even if the evidence relied upon by the accused is not positively believed, they must not convict if that evidence gives rise to a reasonable doubt about guilt.'

[22] In paragraphs 158 to 163 [Pages 141 -142 CR] of the summing up, the trial judge set out the directions for the assessors which may guide them in deciding which evidence to believe and which not to believe and how that may help them decide the guilt or otherwise of the appellant. These directions were correct and covered the relevant evidence in the case for the assessors to consider. The appellant's claim that the trial Judge's verdict was perverse may have arisen from his refusal to accept the assessors unanimous verdict of not guilty on both charges. The assessors' verdict of not guilty, on both counts against the appellant was open for them to reach on the evidence led at the trial. The trial judge on the other hand is the final arbiter of facts and law in Fiji, and he is at liberty to not accept the verdict of the assessors, as he did in this case. However, if a trial judge after giving proper directions on relevant evidence in a trial for the assessors and they after hearing and observing the witnesses decide unanimously to find the appellant not guilty as charged, and the trial judge does not agree with the assessors verdict, he is must provide cogent reasons to explain the basis of his decision.

[23] The trial judge made no reference to section 237(4) of the Criminal Procedure Act which states: "When the Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be - (a) written down; and (b) pronounced in open court." The case law governing the duty of providing reasons when a trial judge disagree with assessors is clear in what is expected.

[24] The Supreme Court in **Lautabui v State** [2009] FJSC 7 examined the trial judge's duty in ***disagreeing with the assessors*** and stated as follows:

> *'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have **"cogent reasons"** for differing from their opinion. The reasons must be founded on the **weight of the evidence** and must reflect the judge's views as to **the credibility of witnesses**; **Ram Bali v Regina** [1960] 7 FLR 80, 83 (Fiji CA), affirmed **Ram Bali v The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962). As stated by the Court of Appeal in **Setevano v The State** [1991] FJCA 3, at 5, the reasons of a trial judge:*
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> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

Where are the Cogent Reasons for Disagreeing with Assessors Verdict?

[25] The question is, has the trial judge correctly followed the guidance given in the cases referred to in the paragraph 24 above. I am of the view he has not. This was a case in which the appellant with others gave evidence at the trial. In reviewing the judgement and the summing up, the trial judge has simply referred to the evidence of the complainant and the evidence of the appellant and concluded that he believed the complainant's evidence. There are no references given by the trial judge, in the judgement which specifically cover the elements of the offence of rape, have been proven. For example, at paragraphs 68, 69 and 70 of the judgment, the trial judge states:

> *'[68] After considering the evidence of the prosecution and the defence witnesses I accept the evidence of the complainant as truthful and reliable I have no doubt in my mind that she told the truth in court, her demeanour was consistent with her honesty. The complainant was able to recall what the accused had done to her some 4 years ago and was able to describe what the accused had done to her. The*

complainant was able to withstand vigorous cross examination and was not discredited she was forthright in her answers and not evasive.
[69] Although the complainant did not tell her elderly grandfather what the accused had done to her immediately after both the incidents does not affect her credibility. The complainant was a 17 year old child living in a typical village setting with her elderly grandfather who was sickly could not be expected to talk to her grandfather about matters of sexual nature.
[70] The complainant responded positively when her mother took her to the Police Station to report the matter about what the accused had done to her. I accept the complainant had told the baby-sitter Adisivo Sera and Niko Koroi the son of the accused about the accused sucking her breast'

[26] At paragraph 72 to 75 of the judgment, the trial judge states:

"[72] The accused also did not tell the truth when he denied the allegations and stated that the complainant was lying. In cross examination the accused was cautious he chose his words carefully being a longtime employee of the resort under construction he knew when the workers from mainland Lautoka would be leaving for home for a break. The accused told the court that the workers from mainland would leave the Island every three weeks which means one of the dormitories would be empty. This gives credence to the evidence of the complainant that when she went with the accused to the resort one dormitory was empty and there were few workers only. The accused informed the court that his relationship with the complainant was good after she left his house so there was no need for the complainant to make any false allegation against him.

[73] I also reject the assertion by the defence that the complainant had left the house because she had stolen the money of the accused aunt. This proposition was not put to the complainant by the defence. Moreover, the accused knew the grandfather of the complainant yet he did not inform him about the complainant stealing money from his house if indeed the complainant had stolen money as stated by the accused.

[74] Furthermore, I do not accept the evidence of the wife of the accused that every night she slept with the accused when the accused himself told the court that there are instances when he would stay on the Island which was also supported by Avitesh. I also do not believe that the wife of the accused can know when her husband leaves the bed when she was asleep and also it is not just possible for her to know what the accused would be doing after he leaves the bedroom in the night. She did not say in her evidence that she would follow her husband to the bathroom or anywhere else in the house.

[75] The fourth defence witness Avitesh Kumar although not related to the accused was known to the accused for a longtime and were workmates. I accept the evidence of Avitesh to the extent that since the resort was under construction due to safety reasons females were not allowed near the constructions site.

[27] At paragraphs 42 to 45 and 73 evidence of the defence suggest that the complainant stole $400 belonging to the appellant's aunt and evidence of the complainant's mother and stepfather visiting the appellant's family to apologise for the complainant has done because she was a liar. This was simply rejected by the trial judge without any reasons given, based on the evidence led at the trial. Yet the assessors who heard the same evidence must have decided that it affected the credibility of the complainant, they did not find the appellant guilty.

[28] In paragraph 73 of the judgement it states "I also reject the assertion by defence that the complainant left the house because she had stolen money belonging to the appellant's aunt. This proposition was not put to the complainant by the defence' The evidence alleging that the complainant may have stolen money was part of the trial evidence via the defence witnesses. Is it enough to simply reject it because the defence counsel did not raise it with the complainant? It was given in as evidence-in-chief by DW3 Melaia Koroi at page 308 of court record and she was cross-examined by the prosecution at pages 315 to 317 on the same. It is difficult to understand why this evidence was note fully appraised, because of its direct relevance to issue of credibility of the complainant. It was simply rejected on some procedural basis, without providing any reasons to explain the basis of such rejection. The trial judge's role to be fair to both parties, in assessing evidence once it is introduced in the trial, must be maintained.

[29] At paragraph 81 of the judgment the trial judge states:

> *'[81] On the totality of the evidence the defence has not been able to create a reasonable doubt in the prosecution case.'*

[30] This is an odd statement because it indicates the trial judge's position, in not evaluating the evidence fairly. The defence is not required to create a reasonable doubt in the prosecution case. The prosecution is required to prove its case beyond reasonable doubt. The same evidence the trial judge heard and the same witnesses he observed were also seen and observed by the three assessors who found the appellant not guilty on both counts. That is the reason the law requires cogent reasons to be given by the trial judge when disagreeing with the majority or unanimous assessor's verdict of not guilty.

[31] Another example of lack cogent reasons arise when the trial judge had erred when accepting the complainant's evidence as credible when it was vague creating a reasonable doubt about her credibility. The complainant's evidence at paragraph 38 of the summing-up (see paragraph 6 of the judgment too) in examination-in-chief and her answer under cross-examination at paragraph 60 of the summing-up as an example of her lack of credibility:

> *38. After the school started she had a boil on her right breast, as a result of this boil during night time she did not wear any top and slept wearing her skirt only. One night whilst sleeping she felt someone was sucking her breast. When she woke up she saw it was the accused her uncle, at this time* ***she was alone*** *in the bedroom. When the complainant saw her uncle she was scared and nervous, he sat on the bed and told her not to tell anyone about what he had done.*
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> *60. When it was put to the complainant that never in any given night she had slept alone in the bedroom because it was always occupied by her, Kelera and Paulini the complainant agreed. The complainant stated that she told the truth that the accused had come into the night and sucked her breast. She also denied it was Niko her boyfriend who had sucked her breast.'*

[32] It appears from paragraph 57 of the summing-up that the complainant had agreed that she slept in one bedroom with Kelera Adikula and Paulini and from paragraph 59 of the summing-up it appears that she had said that there was one bed in the bedroom and sometimes she slept with Kelera while Paulini slept in the sitting room and the complainant had denied that on the night of the alleged incident Paulini and Kelera were sleeping in the bedroom. According to paragraph 7 of the judgment the complainant had shared the bedroom with the daughter of the appellant who on that night was sleeping in the sitting room. Thus, there was no unequivocal admission by the complainant that when the indecent assault happened Kelera or Paulini was in the bedroom or on the bed with the complainant. Having analyzed all the evidence the trial judge had said as follows:

> *'68. After considering the evidence of the prosecution and the defence witnesses I accept the evidence of the complainant as truthful and reliable I have no doubt in my mind that she told the truth in court, her demeanour was consistent with her honesty. The complainant was able to recall what the*

accused had done to her some 4 years ago and was able to describe what the accused had done to her. The complainant was able to withstand vigorous cross examination and was not discredited she was forthright in her answers and not evasive.'

[33] The above shows that the trial judge had no doubt in his mind that the complainant told the truth because her demeanour was consistent with her honesty. What was the basis for making this determination? None was stated by the trial judge. It resulted in his unfairly assessing the evidence in this case by simply overlooking the inconsistencies in complainant evidence on the basis that he believed her as credible. Often truthfulness and demeanour of a witness are not the best basis to accept once evidence, because many witnesses are firm in their demeanour but are liars. It begs the question to make that kind of assessment without clear basis on the evidence. In the Court of Appeal of Alberta (Canada) Mr. Justice Anderson in **R v McKay** (2011) Alta 314 observed that: **'skilled liars can present very well."**

[34] In the light of the review undertaken above, regarding the totality of the evidence, I am not satisfied that the trial judge has not provided cogent reasons to override the unanimous not guilty verdict of the assessors. This failure on the part of the trial judge has resulted in substantial miscarriage of justice against the appellant.

[35] Does the proviso to section 23(1) Court of Appeal Act save the situation here? I am afraid not because the miscarriage in question, is about the lack of fair and balanced evaluation of the evidence given on both sides by the trial judge. Its prejudicial effect has severely affected the right of the appellant to a fair and impartial trial guaranteed under section 15 (1) of the Constitution 2013.

[36] These grounds of appeal succeed.

5th ground of appeal

[37] The appellant complains of incompetent advocacy on the part of his trial counsel in not suggesting to the complainant under cross-examination the allegation of stealing money by her belonging to the aunt of the appellant (see paragraph 102 of the summing-up) and her having been reprimanded by the appellant as the motive for false implication. He alleges that there were other instances of failure to put the defence case but not elaborated them. Apart from the need to satisfy the requirements stated in **Chand v State** [2019] FJCA 254; AAU 078/2013 the issues raised by this ground of appeal is important in the context of the credibility of the complainant evidence, which was a big factor in the trial judge believing her evidence which led to his overturning the unanimous verdict of guilty by the assessors.

[38] The Court of Appeal in **Chand v State** (supra) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal cannot be even entertained at this stage.

[39] The appellant had written to the Judicial Service Commission on 2 May 2019 to complaint against the counsel *inter alia* stating that he had failed to put the defence case to the complainant to demonstrate a motive for the complainant to falsely implicate him as she had stolen money from his house. It appears that the defence witnesses had however spoken to the alleged motive. According to the appellant the reason why the complainant left his house was that one evening when he came home he saw his aunt crying and he was told that the complainant had taken her card to withdraw money. He had scolded the complainant who had left his house because she had stolen his aunt's money. However, he had admitted that he did not report this to the police or to the complainant's grandfather (see paragraph 87 of the summing-up). The complainant and the appellant were on good terms when the complainant was staying at his house and there were no problems between the two (see paragraph 88 of the summing-up). Further, the appellant had said that he did not know why the complainant had made such serious allegations against him because the

relationship between him and the complainant was good even after the allegation of stealing (see paragraph 89 of the summing-up).

[40] It is clear that the gist of all criticisms/allegations is the incompetence of the trial counsel and therefore to succeed in appeal the appellant must convince the appellate court that either the alleged incompetence of trial counsel (such as not presenting his defence to court) caused a miscarriage of justice in that it affected the outcome of the trial in such a way as to cause the appellant squander a reasonable prospect of acquittal in the light of the totality of evidence.

[41] In **R v Birks** (1990) 19 NSWLR 672, the New South Wales Court of Appeal decided that a miscarriage of justice was held to have resulted from the "combined effect of ... various errors". The errors were errors of trial counsel, and of the trial judge. The explanation of counsel's errors was inexperience, but it was the errors (of counsel *and* the judge) that were said to give rise to the miscarriage of justice. It is important to note the significance of the combination of the errors, for the case provides a good example of a failure of the trial process. The accused was charged with rape. He admitted having sex with the complainant, but said she consented. A problem for the defence was that, following the incident, the complainant's face was found to be bruised and cut, in a manner consistent with her account of violence. The accused, before trial, instructed his lawyers that the damage to the complainant's face was the result of a mishap with a torch. When cross-examining the complainant, defence counsel failed to put this to the complainant. The Court of Appeal held that

[42] In **TKWJ v State** (2002) 212 CLR 124, the High Court of Australia held there was a miscarriage because evidence of the accused's character was not led at trial by counsel for the accused. In **R v Birks** (supra) the miscarriage lay in the accused's counsel not cross-examining the complainant about some aspects of her evidence. Both **TKWJ v State** (supra) and **R v Birks** (supra) were cases of omissions by trial counsel for the accused: omissions in adducing or testing evidence at trial. In the present matter, there were said to be both acts and omissions of trial counsel which caused or contributed to a

miscarriage of justice. The critical question is: whether the failure to give proper advice to the appellant would be significant only if, as a result of that failure, something was done or not done at trial, resulted in miscarriage of justice. The inquiry about miscarriage must be an objective inquiry, not an examination of what trial counsel for an accused did or did not know or think about. **The critical question is what did or did not happen at the trial, not why that came about.**

[43] In this case two important issues were NOT subjected to cross examination by the appellant's counsel, and they are critical in evaluating the credibility of the complainant's evidence at the trial. These are: recent complaint evidence, which was delayed and lack of cross-examination of the suggestion that the complainant stole $400 belonging to the appellant's aunt at the appellant's house. These failures meant that not all the relevant evidence that go to the credibility of the complainant's evidence was competently placed before the trial court. Those issues were not cross-examined by the Appellant's counsel during the trial. This was not done resulting in a squandered opportunity of acquittal and resulting in miscarriage of justice.

[44] The court must also address the impact of section 14 (2) (d) of the Fiji Constitution, albeit, briefly on the right conferred by the constitutional provision on the right to legal representation, in ensuring fair trial of an accused person. In the context of this case where the credibility of the complainant's evidence and the weight to be given to it, is the only direct evidence that may support the charges against the appellant; which is met with consistent and unwavering denial by the appellant's evidence. In circumstances where the weight to be attached to evidence and the credibility of the witnesses is critical in the assessment, the court will need to make a determination whose evidence to believe or not. In that light, the fact that the trial counsel did not raise the allegation of the stolen money by the complainant during cross-examination referred to above, takes on a critical significance.

[45] I am satisfied that because the complainant was not cross-examined with regard to the money she was alleged to have stolen, due to the failure on the part of the trial counsel for

the appellant, miscarriage have occurred. Therefore, this appeal ground (ground 5) together with others discussed under grounds 3 and 4, have merit and succeeds.

[46] In conclusion the appeal is allowed for the reasons discussed above.

Qetaki, JA

[47] I have considered the judgment in draft. I agree with it, the reasoning and orders.

Andrews, JA

[48] I agree with the judgment of Mataitoga, RJA.

ORDERS

1. Appeal succeeds.
2. Conviction and sentence in the High Court set aside.

Hon. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL