IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0095 OF 2017

[Suva High Court Case No: HAC 121 of 2016]

BETWEEN : **JOSUA COLANAUDOLU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Andrews, JA

Counsel : **Mr Waqainabete S & Navuni W [LAC] for the Appellant**
: **Mr Samisoni E [ODPP] for the Respondent**

Date of Hearing : **2nd February, 2026**

Date of Judgment : **27th February, 2026**

JUDGMENT

[1] On 12 May 2017, the appellant was charged with the following offences:

FIRST COUNT

Statement of Offence

ABDUCTION: Contrary to section 252 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU between the 1st day of April 1998 and 31st day of December 1999, at Navua in the Central Division, abducted **A. A** in order to subject her to his unnatural lust.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 149 and 150 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU between the 1st day of April 1998 and 31st day of December 1999, at Navua in the Central Division, had unlawful carnal knowledge of **A.A** without her consent.

THIRD COUNT

Statement of Offence

ABDUCTION: Contrary to section 252 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU in February 2000 at Navua, in the Central Division, abducted **A. A** in order to subject her to his unnatural lust.

FOURTH COUNT

Statement of Offence

RAPE: Contrary to section 149 and 150 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU in February 2000 at Navua in the Central Division, had unlawful carnal knowledge of **A. A** without her consent.

FIFTH COUNT

Statement of Offence

ABDUCTION: Contrary to section 252 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU between the 1st day of June 2002 and 31st day of July 2002, at Navua in the Central Division, abducted **S. L. V** in order to subject her to his unnatural lust.

SIXTH COUNT

Statement of Offence

RAPE: Contrary to section 149 and 150 of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU between the 1st day of June 2002 and 31st day of July 2002, at Navua in the Central Division, had unlawful carnal knowledge of **S. L. V** without her consent.

SEVENTH COUNT

Statement of Offence

INDECENTLY ANNOYING FEMALES: Contrary to section 154(4) of the Penal Code [Cap 17].

Particulars of Offence

JOSUA COLANAUDOLU between the 1st day of January 2004 and 31st day of December 2004, at Navua in the Central Division, with intent to insult the modesty of **S. L. V**, exposed his naked penis to her, intending that his penis be seen by her.

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

JOSUA COLANAUDOLU on the 16th day of November 2012, at Navua in the Central Division, had carnal knowledge of **S. A. N** without her consent.

NINTH COUNT

Statement of Offence

ABDUCTION: Contrary to section 282 (c) of the Crimes Act 2009.

Particulars of Offence

JOSUA COLANAUDOLU between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, abducted **MERE AILEVU MACEDRU** in order to subject her to his unnatural lust.

TENTH COUNT

Statement of Offence

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

Particulars of Offence

JOSUA COLANAUDOLU between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, had carnal knowledge of **MERE AILEVU MACEDRU** without her consent.

ELEVENTH COUNT

Statement of Offence

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

Particulars of Offence

JOSUA COLANAUDOLU between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, penetrated the anus of **MERE AILEVU MACEDRU** with his penis without her consent.

TWELFTH COUNT

Statement of Offence

MURDER: Contrary to section 237 of the Crimes Act 2009.

Particulars of Offence

JOSUA COLANAUDOLU between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, murdered **MERE AILEVU MACEDRU**.

[2] The appellant was convicted after a trial in the High Court at Suva on counts 2, 4, 6, 7, 8, 9, 10, 11 and 12. The trial was before Assessors and they found the appellant guilty on all charges. However, the trial judge disagreed with assessors guilty verdict on counts 1, 3 and 5 and he found the appellant not guilty of those charges. The judgement was delivered on 25 May 2017.

[3] On 26 May 2017 the appellant was sentenced to 14 years imprisonment on all the rape charges, 5 years and 6 months on charges of abduction and indecently annoying females. For the murder charge the appellant was sentenced to life imprisonment with a minimum period of imprisonment of 30 years. All sentences were to be served concurrently.

The Appeal

[4] On 15 June 2017 the appellant filed a timely appeal against conviction and amended grounds of appeal were filed on 23 May 2018. When the Legal Aid Commission [LAC] took charge of the appellant's appeal it filed an amended Notice of appeal against conviction with written submissions on 19 June 2020. The State had tendered written submissions on 2 July 2020.

[5] There were 3 grounds of appeal submitted on behalf of the appellant as follows;

> *Ground 1- That the learned trial Judge erred in law and in fact when he failed to consider and accept the evidence of Dr. Salote and Dr. Anaseini at voir dire regarding the injuries discovered on the Appellant through their examination and that these injuries substantiated the complaints of assault on the Appellant.*
>
> *Ground 2- That the learned trial Judge erred in law and in fact when he acted upon a wrong principle in disbelieving the appellant at voir dire on account of the inconsistency in injuries suffered and complaints*

made rather than accepting that there was evidence on injuries which goes to the heart of the admissibility of the caution interview.

Ground 3 - That the learned trial Judge erred in law and in fact when he convicted the Appellant of the count of Murder when there was an insufficiency of evidence to secure a conviction for Murder.

[6] The judge alone considered section 21(1)(b) of the Court of Appeal Act and relevant case law in assessing the reasonable prospects of the grounds of appeal succeeding on appeal to the full court. At the leave hearing, the Judge Alone considered grounds 1 and 2 together because they both are relevant to the appellant's claim that his caution interview and charge statements were not obtained voluntarily but as a result of assaults by the police on him. The issue that exercised the judge alone at the leave stage hearing, was whether sufficient consideration was given by the trial judge to the unchallenged medical evidence that the appellant was assaulted while in police custody. It is true that there are clear discrepancies in the evidence given by the appellant on the assault he received and what is recorded by the two Doctors who medically examined the appellant and prepared reports confirming the injuries found on him.

[7] At paragraph [20] of the Ruling the judge alone observed:

> *"[20] I think in the light of above decisions, it becomes a question of law whether by the methodology adopted by the trial judge he had distracted himself from the vital issue whether the unchallenged medical evidence of the appellant's injuries, though not being fully corroborative of the brutal police assault the appellant made it out to be, had still affected the voluntariness of the confessional statements and if so whether the prosecution had discharged its burden of proving beyond reasonable doubt that they contained voluntary admissions of guilt. Therefore, leave to appeal is not required in regard to this issue but as a matter of formality I would allow leave to appeal. Needless to state that an examination of the full record of voir dire proceedings also would be required to go into this issue as it is also a question of mixed law and facts in the end."*

[8] The above issue will be further considered in light of the Court Record by the full court.

[9] As regards the 3rd ground of appeal, on the record there are detailed submissions to substantiate the ground as stated that there was insufficient evidence to prove the murder charge against the appellant beyond reasonable doubt. The Judge alone considered the submissions made by the appellant. In the context of the other evidence led at the trial, especially those referred to at paragraphs 50 and 54 of the summing up, he concluded that there was no reasonable prospect of the ground 3 succeeding on appeal.

[10] Leave to appeal against conviction against the murder charge was refused.

Full Court Appeal

[11] Before the full court the appellant renewed his appeal against conviction based on the grounds advanced during the leave hearing. These grounds are already set out in paragraph 5 above. This court will now consider the grounds of appeal and adopt the approach of the judge alone and that is consider grounds 1 and 2 together and 3 separately.

Relevant law

[12] Section 23(1) (a) of the Court of Appeal Act 2009 is relevant for appeal in ordinary cases to this court. It states:

> **23**.-*(1) The Court of Appeal on any such appeal against conviction shall allow the appeal; i) if they think that the verdict should be set aside on the ground that it is unreasonable or ii) cannot be supported having regard to the evidence or iii) that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or iv) that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:*
> *Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.*

[13] The Court of Appeal in **Kishore v State [2022] FJCA 40, (AAU 085 of 2016)** explored the requirements of the section 23(1) of the Court of Appeal Act 2009 in these terms. The Court said:

> *"[19] The appellant's complaint has to be considered in the context of section 23(1) of the Court of Appeal Act which provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In other words, although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice. Thus, for an appellant to succeed he or she must demonstrate that not only is there a miscarriage of justice but also there is a substantial miscarriage of justice.*
>
> *[20] It has been held that if a verdict is unreasonable or cannot be supported having regard to the evidence it amounts to a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Pell v The Queen** [2020] HCA 12, [45]). The High Court of Australia has identified three non-exhaustive situations in **Baini v R** (supra) where substantial miscarriage of justice may occur namely (i) where the jury's verdict cannot be supported by the evidence (2) where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome (3) where there has been a serious departure from the proper processes of the trial. In the latter two categories, the court may find a substantial miscarriage of justice even if it was open to the jury to convict. However, finding that it was not open to the jury to acquit (that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice.*
>
> *[21] However, if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice [vide **Aziz v State** [2015] FJCA91; AAU 117.2011 (13 July 2015)]. In other words, if the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial*

> *miscarriage of justice within the meaning of the proviso has occurred. In this process, the appellate court examines the record to see whether, notwithstanding the fact that the evidence of the complainant was assessed by the fact finders to be credible and reliable, either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence, the Court could be satisfied that the fact finders, acting rationally, ought not to have been satisfied of the witnesses' truthfulness and reliability or they ought nonetheless to have entertained a reasonable doubt as to proof of guilt [vide* ***Pell v The Queen*** *(supra)]. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the fact finders, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (see* ***M v The Queen*** *[1994] HCA 63; (1994) 181 CLR 487, 494. See also* ***Inia v The Queen*** *[2017] VSCA 49, [53])".*

We note that the appellant Mr Kishore was refused leave to appeal to the Supreme Court against the judgment of the Court of Appeal: ***Kishore v State*** *[2024] FJSC37; CAV 0033.2022 (29 August 2024)*.

[14] At this stage, the Court of Appeal when considering an appeal, should:

> … *look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the appellant was guilty of the charge he faced.* ***It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty****. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused:* ***Rokete v State*** [*2022] FJSC 11; CAV 002 of 2019 at paragraph 109*.

The Facts

[15] The facts of the case against the appellant had been summarized by the trial judge in the sentencing order as follows.

> *"Between the 1st April 1998 and 31 December 1999, at the age of 22 years old, you attacked the first complainant (PW2), who was a 14-year-old girl at the time. She was tiny, and you were bigger and stronger than her. PW2 was sent to the shop by her parents. You waited for her among the flower gardens. When she came near you, you forcefully grabbed her, gagged her and forcefully took her to your house. There*

you subdued her forcefully and raped her. You warned her not to report on the incident, or you will kill her.

You continually harassed PW2 until February 2000, and did the above incident to her 8 times. She was scared to report the matter until Mere Ailevu's murder in 2016. Next you turned your attention on the second complainant (PW3). She was PW2's elder sister. The sisters were your neighbour in the Vunibuabua/Lepanoni Settlement area. PW3 said sometimes between 1 June and 31 July 2002, she was breastfeeding her baby daughter in their family house. Her daughter was born on 30 May 2002. PW3 said, she was 20 years old at the time. You were 26 years old at the time.

PW3 said, her parents were sleeping in the sitting room. It was night time. You entered their house without their permission. You forcefully took PW3 outside the house. When she wanted to raise the alarm, you put a knife to her throat and warned her not to do so, or you will injure her parents or baby daughter. You took her to an outside dog house. You threw her in the dog house, forcefully took off her clothes and forcefully raped her for about an hour. You fled the scene because you were disturbed by another. PW3 was so scared to report the incident to the authorities, until the Mere Ailevu's murder case arose.

Next you turned your attention on your niece, complainant no. 3 (PW4). PW4 was your elder brother's daughter. On 16 November 2012, you tricked her that her father was looking for her. She was 18 years old at the time. You were 36 years old at the time. Instead of taking her to her father, your elder brother, you took her to the Deuba beach. At the beach, you forcefully subdued her and raped her for 20 minutes. She fainted as a result of the attack. You left her there, and fled the scene. All the above attacks on young women came to a head when you turned your attention on Mere Ailevu, a 14-year-old girl. You were 39 years old at the time.

Throughout the 13 March 2016 (Sunday) you had been drinking liquor with friends. You worked from 8pm on 12 March 2016 (Saturday) to 5am 13 March 2016 at Hide Tide Bar in Deuba. On 13 March 2016, you went home to have your dinner. You felt asleep while having your dinner. After 10pm, you woke up and wandered to the village market. You saw Mere Ailevu at the market. You forcefully took her across the Queens Highway towards the Loloma Beach side. You later threw her over the fence. Then you assaulted her by elbowing her. You forcefully carried her to the beach and repeatedly raped her vaginally and anally. You later left her there and fled the scene. Mere was found dead on the beach on Monday, 14 March 2016 in the afternoon. She died as a result of massive brain injuries.'

Grounds of Appeal & Assessment

[16] By letter dated 28 January 2026, senior counsel for the appellant wrote to the Registrar advising that the appellant will be relying on the Leave Submissions previously filed by the LAC – the Notice of appeal against conviction with written submissions filed on 19 June 2020. The State had tendered written submissions on 2 July 2020.

Grounds of appeal 1 and 2: Admissibility of the Caution Interview & Charge Statements

[17] For the prosecution the admissibility of the caution interview and charge statements were central to their case. Both statements contained admissions by the appellant that he committed all offences he was charged with. If it was proven beyond reasonable doubt that those admissions in the two statements were given voluntarily the appellant will be convicted as charged. It is not surprising that the appellant claimed at his trial that the caution interview and charge statements (that were the main evidence prosecution was relying on), were obtained as a result of assaults by police while he was in their custody.

[18] At the hearing of the appeal, the appellant submitted two grounds for his claim that the caution interview and charge statements were not given voluntarily by him. These grounds were considered together. The appellant submits that the learned trial judge had failed to accept the medical evidence regarding his injuries which substantiated his complaint of police assaults, and that the trial judge only looked at the inconsistency between the medical evidence revealing some injuries on the appellant and the appellant's version of the police assault rather than considering the effect of the appellant's injuries on the admissibility of the confessional statements.

[19] The appellant had been caution interviewed on four occasions. Firstly, it had been on 20 - 22 March, secondly on 23 and 24 March, thirdly on 25 March and fourthly on 26 - 29 March 2016 at Crime Office at Navua police station. He had made partial or full confessions to some counts alleged against him in the course of his cautioned interview. During the recording of the fourth segment of the cautioned interview the appellant had been taken to the crime scene relating to the murder and he had confessed the crimes committed against the deceased Mere Ailevu in the course of the

re-construction of the incident. The police had video recorded this episode and produced the recording to the court as evidence against the appellant. After the last of the interviews the appellant had been formally charged in respect of the offences against Mere Ailevu.

[20] The appellant had challenged his cautioned interview on the basis that the police had repeatedly assaulted, threatened and forced him whilst in police custody, to confess to the alleged crimes which the police had denied. The appellant had been examined by Doctor Behr while he was being held in police custody and before the caution interview took place and by Doctor Anaseini Tabua on the day after the cautioned interview was concluded. The appellant had stated that a police officer had also inserted two fingers into his anus with chillies rubbed on the edge of the anus and the repeated assaults had taken place while he was blindfolded. According to him, fearing further assault he had confessed to the commission of the offences and the confessions were not voluntary or given out of his free will.

[21] Once the appellant claimed that he was assaulted by the police in pretrial custody, and that his caution interview and charge statements were not voluntarily given by him, it was necessary for the prosecution to prove beyond reasonable doubt that his caution interview and charge statements were given voluntarily by the appellant. A *voir dire* hearing was needed.

The *voir dire* hearing

[22] A *voir dire* hearing was held to determine whether the matters recorded in the caution interview and charge statements were given by the appellant voluntarily. The prosecution called 14 witnesses and for the appellant there were 2 witnesses – the appellant and one other.

[23] The appellant's assault claim is recorded at pages 1193 to 1194 [Volume 4 CR]. The appellant also stated the specific places on his body that were assaulted and the number of times. For example, the appellant stated the was punched by the police officer 10 times; two hard punches on the left side of his face and head; a punch to the head and

three hard punches to his ribs. The appellant alleged that the police had stuck two fingers into his anus and rubbed chillies there.

Evidence of Dr Tabua

[24] Dr Anaseini Tabua [PW9] gave evidence at the *voir dire* hearing as to her examination of the appellant, the day after the caution interview statement was recorded. She also prepared a Report setting out her findings. The relevant parts of her evidence are recorded at page 1050 to 1052 of the Copy Record and are set out below:

> *Ms. Lodhia: I will refer you to paragraph D10 of the medical report Madam, could you please read out the history that was relayed to you by the patient.*
>
> *Dr. Tabua: He has been arrested in suspicion to 4 cases and he was assaulted after the arrest. Cannot confirm how he sustained injuries whether just punches or other things. Now, feeling pain on his chest and left side of face and says he accepted the punches because of what was done and because of what he did and he usually experiences the pain and is aggravated when he gets cold.*
>
> *Ms. Lodhia: And what was your initial impression of the person that you were examining, Madam?*
>
> *Dr. Tabua: He was very calm.*
>
> *Ms. Lodhia: I will now refer you to paragraph D12 of the medical report, Madam. Could you please read out your specific medical findings?*
>
> *Dr. Tabua: There was tender on the interior left chest with nil bruise noted. Tender on the lateral aspect of right chest, nil bruise noted. Tender on the left side of face extending from the temporal aspect down to mandible. Tender left side of hip over the ischial tuberosity and there was redness of eyes.*
>
> *Judge: Could you go back to number 1. You have to decode your medical terms down to us. I understand doctors you have your own code, likewise lawyers have their own code. But the model trial now is to bring the information down to the layperson's understanding. So tender number 1, tender in the what?*

Dr. Tabua: *Interior left chest on the left side of the chest on the front part.*

Judge: *Right, interior is out, outside?*

Dr. Tabua: *Yes, outside just the front out.*

Judge: *Front part.*

Dr. Tabua: *The front.*

Judge: *And the next one?*

Dr. Tabua: *Tender on the lateral aspect of the right chest.*

Judge: *What is it?*

Dr. Tabua: *Lateral, right chest so on the side of the right chest, yes right side of chest.*

Judge: *And nil bruise?*

Dr. Tabua: *Nil bruise noted.*

Judge: *Right, and the next one.*

Dr. Tabua: *Tender on the left side of the face but extending from the side of the head down to the mandible.*

Judge: *Right, next one.*

Dr. Tabua: *Tender on the left side of the hip over the ischial tuberosity.*

Judge: *How do you simplify that to us?*

Dr. Tabua: *The ischial tuberosity is the bony prominence on the hip if you feel the hip bone there is a bony prominence that is where the tenderness, the location of the tenderness was.*

Judge: *So bony part of the hip?*

Dr. Tabua: *Yes, bony prominence it's all bony there is a prominence that is coming out that you can feel.*

Judge: *Okay, the last one?*

Dr. Tabua: *Redness of the eyes and then I asked if it was sticky in the morning trying to rule out and it's just written there that it was sticky in the morning, in A.M..*

Judge: *Sticky in the morning, right thank you. Yes, prosecution.*

Ms. Lodhia: *Now, Madam just to assist us in layman's term. Can you please tell us what do you mean by the term 'tender' that you have noted there?*

Dr. Tabua: *Tenderness is pain on touch.*

Judge: *Tenderness is pain?*

Dr. Tabua: *On touch.*

Judge: *On touch.*

Ms. Lodhia: *And in places where you had noted such tenderness on the patient, do you expect to see any bruises or laceration to be present where the tenderness is?*

Dr. Tabua: *I did not see any bruise as noted in my medical examination.*

Judge: *So, you did not see any bruise on the body?*

Dr. Tabua: *No, Your Honor.*

Ms. Lodhia: *And Madam, from your definition of tenderness that it is pain on touch, in your opinion can, given your definition of tenderness can a patient make up the places where the tenderness exists in his body?*

Dr. Tabua: *Tenderness can be subjective because it is feeling since Mr. Colanaudolu express tenderness when I touched, I had to write there was no visible injury.*

Judge: *Put it this way, if the patient is faking it you won't be able to determine it medically?*

Dr. Tabua: *Yes, Your Honor.*

Judge: *Yes*

Ms. Lodhia: *And Doctor would you agree that there is a possibility of the patient self-inflicting such tenderness?*

Dr. Tabua: *It is possible.*

[25] The above evidence provided by Dr Tabua casts doubt on the appellant's allegations of assault in police custody. Her clear and direct evidence on the nature of the assaults claimed by the appellant to have been perpetrated by the police while he was in police

custody following the cautioned interview suggests that the claimed assaults were possibly faked. It appears from the trial judge's summary when delivering his ruling on the *voir dire*, that Dr Salote Behr's finding in her Medical Report D-10 also supports the findings made by Dr Tabua and the answers she provided in her evidence in chief during the *voir dire* hearing.

Evidence of the Justice of Peace – PW10 Ashok Bali

[26] Another important piece of evidence was that given by PW10 Ashok Bali a businessman and Justice of Peace who gave evidence during the *voir dire* hearing. His evidence is at page 1062 to 1067 of the Copy Record. The relevant part is quoted below:

Mr. Bali:	*Ashok Kumar Bali.*
Judge:	*Your home address Mr. Bali?*
Mr. Bali:	*Navua.*
Judge:	*What is your occupation?*
Mr. Bali:	*Businessman.*
Judge:	*Businessman. Right thank you, you may sit down. Your witness Prosecution.*
Ms. Lodhia:	*Good afternoon, Mr. Bali.*
Mr. Bali:	*Good afternoon.*
Ms. Lodhia:	*Now Sir can you please tell us if you are a Justice of Peace?*
Mr. Bali:	*Yes*
Ms. Lodhia:	*And how long have you held that position for?*
Mr. Bali:	*6, 7 years*
Ms. Lodhia:	*I will take you to the 30th of March, 2016 Sir. Do you recall being asked to see a suspect named Josua Colanaudolu at the Navua Police Station?*
Mr. Bali:	*Yes*

Ms. Lodhia: *Who asked for you to see the suspect at the Navua Police Station?*

Mr. Bali: *Crime Officer, Mr Elia.*

Ms. Lodhia: *What was the purpose for which the Crime Office had asked you to see the suspect?*

Mr. Bali: *To ask whether what he had done.*

Judge: *Ask him what?*

Mr. Bali: *What he have done and why he is here in the station.*

Ms. Lodhia: *And did you go to see the suspect at the Navua Police Station?*

Mr. Bali: *Yes.*

Ms. Lodhia: *Do you recall the time on the 30th of March, 2016 that you had went to see?*

Mr. Bali: *9.30.*

Judge: *AM, PM? AM or PM?*

Mr. Bali: *AM.*

Ms. Lodhia: *What happened once you had reached the Navua Police Station?*

Mr. Bali: *I went and shook hand with him and greet him and introduce myself to him.*

Ms. Lodhia: *Where was the suspect when you first saw him at the Sation?*

Mr. Bali: *Navua Police Station*

Ms. Lodhia: *And what was he doing?*

Mr. Bali: *He was sitting down on the bench.*

Ms. Lodhia: *Once you had introduced yourself Sir, what happened then?*

Mr. Bali: *Then I asked him, what are you doing here, do you know what you have been charged for?*

Ms. Lodhia: *How did he respond to this?*

Mr. Bali: *He said he has been charged for 3 counts of rape and 1 count of murder.*

Ms. Lodhia: *What else did you say to him?*

Mr. Bali: *Then I asked him, 'what you going to do now?' He said, he'll go to the Court and he will tell the truth that he had committed the offence.*

Ms. Lodhia: *Now, at this time that you were conversing with the accused, was there anyone else present apart from you and him?*

Mr. Bali: *No, myself and him.*

Ms. Lodhia: *How long did you converse with him for?*

Mr. Bali: *About 15 minutes.*

Ms. Lodhia: *During your conversation did you ask him whether he had any complaints about any Police mistreatment?*

Mr. Bali: *No, he said he gave the evidence on his freewill.*

Ms. Lodhia: *Did the suspect Josua complain to you about any threats or assault by the Police?*

Mr. Bali: *No.*

Ms. Lodhia: *And at that time when you were conversing with Josua, what was his demeanour like?*

Mr. Bali: *He was like an ordinary person to me, very cooperative.*

Ms. Lodhia: *Did he appear to be in pain or discomfort to you?*

Mr. Bali: *Yes, he was comfort and co-operative.*

Ms. Lodhia: *My Lord, I have no further questions.*

Judge: *Cross-examination Defence. Thank you.*

Cross-Examination by Mr. Fesaitu

Mr. Fesaitu: *Good afternoon, Mr Bali.*

Mr. Bali: *Good afternoon.*

Mr. Fesaitu: *You said that you are a Justice of Peace for 6 years, sorry 7 years?*

Mr. Bali: *Yes, 7 years going. It was 6 years last year.*

Mr. Fesaitu: *And prior to this case, have you visited the Navua Police Station any time in respect of major crime matters?*

Mr. Bali: *No.*

Mr. Fesaitu: *So this was the first?*

Mr. Bali: *First time.*

Mr. Fesaitu: *From your, how long have you stayed in Navua?*

Mr. Bali: *Since birth.*

Mr. Fesaitu: *Now, it was the request of the Crimes Officer Elia and not the suspect?*

Mr. Bali: *No.*

Mr. Fesaitu: *For you to come down to the Navua Police Station on 30th March, last year?*

Mr. Bali: *No.*

Mr. Fesaitu: *And the suspect you are referring to is Josua Colanaudolu who is sitting behind me?*

Mr. Bali: *Yes, Sir.*

Mr. Fesaitu: *And you said you had a conversation with the suspect for about 5 minutes?*

Mr. Bali: *Yes, 5 to 10 minutes.*

Mr. Fesaitu: *5 to 10 minutes.*

Mr. Bali: *Yes.*

Mr. Fesaitu: *And was the entire conversation, was it recorded by you?*

Mr. Bali: *No.*

Mr. Fesaitu: *The entire conversation was just verbally done, is that correct?*

Mr. Bali: *Yes.*

Mr. Fesaitu: *Now, I am putting it to you Mr. Bali. During your conversation with the Josua he complain to you that he felt he was in pain, his chest, his left side of the face?*

Mr. Bali: *No, not at all Sir.*

Mr. Fesaitu: *And I further put it to you, Mr. Bali that during your conversation at no time did Josua make any confessions to you; what's your answer?*

Mr. Bali: *No.*

Mr. Fesaitu:	*So, no he did not; you confirmed?*
Mr. Bali:	*Yes.*
Judge:	*Did he make any confession to you?*
Mr. Bali:	*I asked him whether he had done the crime he said, yes. That is what he said, no other conversation he said. He said, yes he had done it.*
Mr. Fesaitu:	*Well, I am putting it to you Mr. Bali that he did not confessed that?*
Mr. Bali:	*No, he said that he has done the crime.*
Mr. Fesaitu:	*Can you wait until I finish my question and then you answer. I am putting it to you, that he did not make any confessions that he did it.*
Mr. Bali:	*He did confess.*
Judge:	*So, you telling me you asked him whether or not he did the crime and according to you he confessed to you?*
Mr. Bali:	*Yes, he said yes.*
Judge:	*That is, he did the crime?*
Mr. Bali:	*Yes.*
Judge:	*I am mindful of the trial within trial function is not to determine guilty or any sort just advisable and the [Mr. Fesaitu talking]*
Mr. Fesaitu:	*Yes, My Lord; just putting our case across.*
Judge:	*Yes, proceed.*
Mr. Fesaitu:	*Thank you, Mr. Bali. No further questions.*
Judge:	*Alright, thank you. Re-examination.*
Ms. Lodhia:	*None, My Lord.*
Judge:	*Thank you witness, you may stand down.*

[27] We refer to paragraphs 13-16 of the *voir dire* ruling dated 12 May 2017 [***Colanaudolu v State*** *[2017] FJHC 381; HAC121.2016S (12 May 2017)*]:

> *13. I have carefully listened to the witnesses of the parties during the voir dire hearing. I have carefully considered their evidence and compared them. I have looked particular to the two doctors' medical reports, which were accepted into evidence, for confirmation or otherwise of the parties' position on the issue of assaults. Doctor Salote*

Behr examined the accused at CWM Hospital on 22 March 2016 at 4.45pm and finished at 5.45pm.

14. In D (10) of her report, Doctor Behr noted "minor laceration on left side of the tongue". In court, the accused drew the length of the laceration of his tongue as 1 ¼ inches. In my view, a 1 ¼ inches cut to the tongue is not minor, thus the accused's version differs from the doctor's. Secondly, the doctor noted "mild swelling and tenderness over left jaw and limited range of movement". In court, the accused said, on 20 March 2016, the police threw 10 hard punches on his body. He said, some of the punches landed on his jaw. In my view, I would expect not mild swelling, but serious swelling on his jaw and a possible broken jaw if he was punched hard on the jaw. The police officers who gave evidence in court were big men, and their punches on the accused would not leave a "mild swelling and tenderness". The other injuries noted by the doctor were "tenderness behind left ear and right costal region". In court, the accused said he was given 10 hard punches to the body and kicked hard on the hips and back. However, the doctor mentioned no injuries on these parts of the accused's body.

15. Also, Doctor Behr saw no laceration or bruises on the accused's anus. Accused said they roughly rubbed the chilies on the edge of his anus. One would expect some injuries to that part of his body, but none were found.

16. As for Doctor Anaseini Tabua, she medically examined the accused on 30 March 2016 at 11.10am at Navua Hospital. In D(12) of her medical report, she noted in injuries number (i) to (iv) tenderness in left chest, right chest, left side of face and left side of hip. The accused in court said he was given 10 hard punches and kicks to his body. In my view, seeing the police officers who appeared in court, if the accused was telling the truth, I would expect the accused to be seriously injured if he was in fact punched and kicked repeatedly by police.

[28] The trial judge ruled the caution interview and the charge statement of the appellant were voluntarily given, rejecting the evidence of assault against the appellant based on the medical reports called by the prosecution. The caution interview and charge statements were allowed in as admissible evidence at the trial. The trial judge did not address the fact that the appellant did have injuries that should have been explained as to how they came about. The assessors obviously accepted the admission of the appellant that he committed the offences on which he was charged. In this regard the evidence of Mr Bali, to whom the appellant spoke at the Navua Police Station House supports the finding of the *voir dire* hearing – the appellant admitted to a civilian witness that he had committed the offences he was charged with.

[29] The assessors still had to review the evidence and decide whether the confessions in those statements were true, and could be taken into consideration in deciding their final verdicts whether the appellant was guilty or not of the offences he was charged with.

Circumstantial Evidence Relied by Prosecution for Count 12 (murder)

[30] In respect of the count of murder, the prosecution at the trial called circumstantial evidence to prove its case against the appellant.[1] We have set out below summaries of the evidence given by three witnesses that were called by the prosecution. Their evidence placed the appellant at the scene of the crime at the time of the alleged office and they all identified the appellant as the person who committed the criminal acts charged, the subject of the charges:

1. PW5 - Josivini Maria – Pages 1370 -1375 Vol. 4 CR

   On 13 March 2016 at around 10pm , she went to the village canteen to buy mosquito coil. Before reaching the canteen, she heard something which made her turn to her right just when lights from 2 passing cars showed "Uncle Joe" coming over the fence from Loloma Beach back to the village. The appellant is known to this witness because he is her uncle. This witness's evidence was unmoved by the cross examination.

2. PW6 - Meraia Kula – refer to pages 1396 to 1398 Vol 4 CR

   On the night of 13 March 2016 at around 10 pm, she saw a man holding on to something that looked like timber which he carried across the road towards the beach. Then he threw the object he was carrying over the fence on to the beach. He went over the fence and picked up the same object. The deceased Mere Ailevu was found dead on the beach the next day. PW7 Sereti Chapman gave evidence which support Ms Kula's evidence as well.

3. PW9 – Logapila Salailagi -Reference pages 1444 to 1446 Vol 4. CR

[1] In respect of the sexual offending charged in Counts 1 to 8, evidence was given by the respective complainants.

On night of 13 March 2016 after the church service around 10 pm she was waiting to take a photograph with assistance of the light of a truck that was coming and travelling towards Sigatoka. After the truck went past them, she saw the appellant standing beside a house. Witness saw the appellant trying to hide himself by ducking down when the lights of the passing vehicles shone on him. She saw the appellant cross the road from the village side to the beach carrying something in front of him using both his hands, which he threw over the fence on the beach side of the road. She last saw the appellant heading up towards the gate to a Christian Camp.

If the Caution Interview and Charge Statements are excluded – What then?

[31] It is unclear from the evidence called whether the incompatibilities of the appellant's description of assaults and the doctors' observations of injuries on his body, were sufficient to discard the appellant's admission in his caution interview and charge statements. If this court were to accept that apart from the assaults referred to the medical reports provided by the two medical doctors, there were other assaults which may have caused the appellant's statement as involuntarily given, then the statements should be disregarded. The court must consider if there is other admissible evidence to support the conviction of the appellant.

[32] The prosecution argued that even if the caution interview and charge statements were excluded, there is enough other evidence presented at the trial to prove all the charges that the appellant was charged with. These have been referred to already in parts of this judgement.

[33] There is also the evidence of Mr Bali, who had a conversation with the appellant at Navua Police station on 30 Mach 2016. In that conversation the appellant admitted that he committed all the offences for which he is charged. Despite sustained cross examination by counsel for the appellant, this witness was not shaken in confirming that the appellant told him that he committed the all offences for which he was charged.

[34] Further, evidence was given by the police officer who testified as to the reconstruction of the scene of the crime, the appellant had again admitted that he murdered Mere Ailevu Macedru. A video recording of the reconstruction was prepared and admitted as evidence which again was not challenged by counsel for the appellant at the time it was made, or when it was shown during the trial.

[35] We are of the view that there was enough evidence available at the trial, apart from the caution interview and charge statements, to support the conclusion of the trial judge at the trial.

Appeal Ground 3 – was there insufficient evidence to secure a conviction for murder?

[36] It is clear that at the appellant's trial, his defence was relying solely on their claim that the caution interview and charge statement should not be admitted in evidence.

[37] The State submitted to this Court that if the interview and charge statements of the appellant were excluded, there was sufficient circumstantial evidence at the trial to convict the appellant as charged. The circumstantial evidence has been referred to and assessed above. The important issue then became that the assessors should be properly directed on how to deal with circumstantial evidence especially that given by PW5 Josivini Maria, PW6 Meraeia Kula and PW9 Logapili Salailagi summarised at paragraph [30] above.

[38] The trial judge at paragraph 53 to 56 of the Summing-up at pages 82 – 83 Vol 1 CR gave the following directions:

> *"53. On the other types of evidence, the State relied on what is often termed circumstantial evidence. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say "We now know everything there is to know about this case". But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against*

him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

54. *The State called Josivini Maria (PW5) and Logapila Salailagi (PW9) who attended the Assembly of God church opposite the Queens Road, near the crime scene from 7pm to 10pm on 13 March 2016. Both of them said, they saw the accused carrying something across his chest with both hands, and he crossed the Queens Road to the beach side, after 10pm on 13 March 2016. They said they saw Josua throw something over the fence. Both PW5 and PW9 have resided in Lepanoni Village for a long time and knew Josua well. PW5 and PW9 were with Meraia Kula (PW6) and Sereti Chapman (PW7) at the same time. PW6 and PW7 said they were attending the same church as PW5 and PW9 and the church concluded after 10pm. Both PW6 and PW9 said they saw a huge man carrying something across the Queens Road towards the beach side and threw the same over the fence. They said they couldn't identify the man. All the above witnesses said the lights from the passing vehicles allowed them to see the man. You have heard the evidence of these witnesses in court, and it is for you to judge their credibility. Note how similar their stories are to the accused's alleged confession in his caution interview statements and when taken for a scene reconstruction. Look at how he explained in the video recording how he carried Mere across the road and threw her over the fence.*

55. *Next, consider Doctor James Kalougivaki's (PW1) evidence, and how he described the injuries suffered by Mere. PW1 tendered Mere's Post Mortem report as Prosecution Exhibit No. 2. Mere cannot speak during the trial because she is dead. However, she can speak to us through her injuries and the cause of her death as recorded in her post-mortem report. Please, read the post-mortem report carefully. In the Booklet of Photos, tendered as Prosecution Exhibit No. 11, you can see the built of Mere in Photo 8, 9 and 10. You have seen the accused during the whole of this trial. He is certainly a big and strong man, compared to Mere. Doctor Kalougivaki said Mere died of massive brain injuries as a result of blunt force trauma. Is it possible that when the accused threw her over the fence and when she landed on the ground, did that lead to the injuries? Is it possible that the accused elbow assault to Mere's head caused those injuries? Is it possible that the accused further assaulted her to subdue her to enabled him to rape her? What does Mere's injuries, as recorded in the post-mortem report tell you?*

56. *Furthermore, consider the rape complaints of PW2, PW3 and PW4. All these ladies complained against the accused attacking then when they were young girls and then raping them. His methods of attack appeared similar in their cases and Mere's case. He starts off by taking them by force, subdues them by force and the punching of the thighs and then raping them. What do these stories tell you. What do all the above circumstantial evidence tell you? Does the circumstantial evidence lend more credibility to his alleged confession to the police? Whatever you decide, is a matter entirely for you.*

57. *If you accept the above confession and/or circumstantial evidence, then you must find the accused guilty as charge on count no. 9 to 12. If otherwise, you will have to find the accused not guilty as charged on count no. 9 to 12."*

[39] The Supreme Court in ***Josateki Lulu v State*** *[2017] FJSC 19 (CAV 035 of 2016)* referred to the English decision in ***McCreevy v DPP*** *[1973] 1 WLR 276* and stated that what is required is a clear direction that the assessors must be satisfied of the guilt of the accused beyond reasonable doubt and that there is no standard form of direction for evaluating circumstantial evidence. In the context of this case, the above directions is adequate. We accept that the summing-up provided by the trial judge was correct in emphasising to the assessors that they must be satisfied of the guilt of the appellant beyond reasonable doubt when evaluating the circumstantial evidence.

[40] We have considered other evidence which we have discussed above, namely, the evidence of Mr Bali of the admission of the appellant to him and the circumstantial evidence of the witnesses discussed at paragraph [30] above. The appellant argues the circumstantial evidence relied upon by the prosecution was insufficient to support the murder charged. The guideline approach is that which the Supreme Court stated **in Rokete v State** (supra) stated, which is for the Court of Appeal should *look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the appellant was guilty of the charge he faced.* ***It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty****. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused."*

[41] We are satisfied that on the totality of the evidence in this case, it was reasonably open to the trial judge to conclude beyond reasonable doubt that the appellant was guilty of the charges he was indicted for, including the murder charge. In the end there was no need to rely on the proviso of section 23(1) of the Court of Appeal Act 2009, we are satisfied that the strength of the circumstantial evidence adduced, we assess that on the totality of evidence the trial, the trial judge could conclude beyond reasonable doubt that the appellant was guilty of the charges he faced.

[42] Further we are not persuaded that the trial judge made any error of law in his assessment of the evidence, nor that there is any basis for setting aside the findings against the appellant due to any miscarriage of justice.

[43] We therefore conclude that the appeal against conviction fails and must be dismissed, and the judgment of the High Court affirmed.

ORDER:

The appeal against conviction is dismissed.

The Hon. Mr Justice Isikeli Mataitoga
PRESIDENT OF THE COURT OF APPEAL

COURT OF APPEAL FIJI

The Hon. Mr Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL