IN THE COURT OF APPEAL
[ON APPEAL FROM THE HIGH COURT]

CRIMINAL APPEAL NO. AAU 0033 OF 2015
[High Court Criminal Case No. HAC 0021 of 2015]

BETWEEN : **DAVENDRA NARAYAN CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : Almeida Guneratne, JA
Prematilaka, JA
Nawana, JA

Counsel : A K Singh for the Appellant
L J Burney for the Respondent

Date of Hearing : 18 September 2019

Date of Judgment : 03 October 2019

JUDGMENT

Almeida Guneratne, JA

[1] I have had the benefit of reading the judgment of Justice Prematilaka in draft. I agree entirely with his reasons, conclusions and the Orders on the Appeal against the Conviction. In regard to the sole ground of appeal against the sentence, I would have preferred to reject the same as being a fresh ground of appeal which His Lordship himself noted. I say that, respectfully, for the following reasons which I proceed to reflect on in the ensuing paragraphs briefly.

On the application of the principle of Retrospectivity

[2] *Prima facie*, to my mind, I have my own reservations as to whether the sentencing consequence upon conviction is merely a procedural matter and not a matter of substantive law. Following upon the heels of that query which I posed for myself, I was not able to convince myself that, the Common Law is not part of Substantive Law, given the established Sources of Law in the science of Jurisprudence in all developed jurisdictions.

On the two apparent schools of Judicial thought

[3] My brother, Justice Prematilaka, in an exhaustive exposition of the judicial precedents commencing at paragraph [59] to [79] of his judgment has addressed that. Reading between the lines of those paragraphs, I noted that, the State's argument that the views expressed by His Lordship Justice Keith were to be regarded as being *per incuriam* (referred to at paragraph [75] of Justice Prematilaka) then, the option for the State was to seek a Revision of those decisions, an option provided by the Constitution and not obliquely agitated that issue before this Court in this Appeal.

[4] Having said all that, I felt fortified when reading his draft Judgment where His Lordship did not address the *per incuriam* argument advanced by the State and settled on the precedents which His Lordship relied on at paragraphs [68] to [71] of his Judgment which I agree on principle.

Prematilaka, JA

[5] This appeal arises from the conviction of the appellant on three counts of rape contrary to section 149 and 150 of the Penal Code and consequently the sentence imposed.

[6] The charge sheet dated 30 July 2007 alleges under the first count that the appellant between 01 January 2005 and 31 December 2005 at Nadi in the Western Division had carnal knowledge of P (name withheld) without her consent. The second count alleges that between 01 January 2006 and 31 December 2006 at Nadi in the Western Division the appellant had carnal knowledge of P (name withheld) without her consent. The third

count states that on 17 January 2007 at Nadi in the Western Division the appellant had carnal knowledge of P (name withheld) without her consent.

[7] The appellant elected to be tried in the Magistrates' Court. Following the trial, he was convicted of all three counts on 20 January 2015. After recording the conviction, the learned trial Magistrate transferred the case to the High Court for sentence pursuant to section 190(1) (b) of the Criminal Procedure Act 2009. On 20 February 2015, the High Court sentenced the appellant to a total term of 13 years 11 months and 10 days imprisonment with a non-parole period of 11 years.

[8] The appellant had sent a letter dated 03 March 2015 to the Registrar of the Court of Appeal with a heading *'Application Leave to Appeal…'* indicating his dissatisfaction with the conviction and sentence and informing that his counsel would file grounds of appeal for the hearing. The registry had received amended grounds of appeal from the appellant's lawyers on 06 May 2015 eleven of which were against conviction and 03 against sentence followed by written submissions dated 04 July 2016. On 23 January 2017, the appellant's attorneys had filed another notice of amended grounds of appeal accompanied by written submissions.

[9] In the ruling delivered on 13 February 2017, the single Judge had refused leave in respect of all grounds of appeal against the conviction and the sentence.

[10] It appears that the appellant had not filed a renewed application. However, he had filed a new set of grounds of appeal on 05 June 2019 and written submissions on 01 August 2019. The State had filed supplemental submissions in response to the appellant's last submissions on 06 September 2019 having filed two sets of written submissions on 02 August 2016 and 30 January 2017 prior to the leave to appeal hearing. It appears that except the first ground of appeal which is somewhat similar to the fourth ground considered by the single Judge, the rest are completely new grounds.

Grounds of Appeal

[11] The grounds of appeal so submitted to Court for consideration before the Full Court are as follows. The counsel informed Court at the hearing that he would not pursue 03rd and 04th grounds of appeal and he would urge only the 01st and 02nd grounds against conviction and the sole ground of appeal against sentence.

> *'1. That the Learned trial Magistrate erred in Law when he failed to properly direct himself of the effect of the contradictions in the Prosecution Witnesses' testimony and or the law of inconsistent or omission of the evidence.'*
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> *2. That the conviction was unsafe and unsatisfactory having regard to the entire sum or totality of the evidence at trial, in particular:*
> *i. Inconsistent date of incident. (AB 132-133)*
> *ii. Evidence was discredited In Cross-examination. (AB 134-138)*
> *iii. Evidence of having chances to complain the matter (AB 136)*
> *iv. Evidence of Complainant and other witnesses were contradicting with each other.*
> *v. Incident reported after 021 days without any cogent reason.*
>
> *3. That the Learned Trial Magistrate erred in law when he failed to allow the defendant to tender a letter written by Mr. Gyan Chand Prasad (AB 159).*
>
> *4. That the Learned Trial Magistrate erred in law when he without any valid reason to disbelieve the Defendant and his witnesses and rejected their evidence.*
>
> *Sentence*
>
> *5. That the Learned Sentencing Judge erred in law and facts when he failed to consider the tariff for the offence of Rape that imposed in year 2005 to 2007 when the alleged offence was committed to be consistent of be sentences passed by various Court in those years.'*

[12] However, this Court is of the view that where an appellant raises new grounds of appeal after the leave to appeal ruling but before the appeal hearing such grounds cannot be regarded as renewed grounds. Rule 37 of the Court of Appeal Act on the *'Amendment of notice of appeal'* cannot be used when totally new grounds are sought to be urged before the full court (vide **Rokodreu v State** AAU0139 of 2014: 29 November 2018 [2018] FJCA 209).

[13] In the absence of any statuary provisions and practice directions, this Court would follow the approach adopted by the Court of Appeal in **Nasila v State** AAU0004 of 2011:6 June 2019 [2019] FJCA 84 which dealt with a similar situation where totally fresh grounds of appeal were urged for the first time at the hearing before the full court.

[14] The appellate courts have had to deal with this unhealthy practice of appellants or counsel coming up with new grounds of appeal before the full court and frowned upon them in no uncertain terms (See **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Rokete v State** AAU0009 of 2014: 7 March 2019 of [2019] FJCA 49)

[15] Then, in ***Nasila*** the Court of Appeal lamented the continuation of the same as follows.

> *'[9] Despite these observations the practice of submitting totally new grounds or grounds which are only marginally or remotely similar to the grounds urged at the leave to stage continues, making the time and effort of the single Judge of this court a complete waste……. The strategy of the counsel for the appellant in such cases appears to be to try out some new arguments before the full court abandoning the grounds argued and disallowed by the single Judge in the hope that by doing so they have a better chance of succeeding in appeal….. In this regard, I can only reiterate the sentiments expressed in **Tuwai** and **Rokete** against this unhealthy practice.'*

[16] In this background this Court in ***Nasila*** applied the test for extension of time seeking leave to appeal in respect of new grounds of appeal being brought for the first time before the Full Court.

> *'[14] ……..**, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal**, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, **the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned**.' (emphasis added)*

[17] **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17, have provided guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed.

[18] In ***Rasaku*** the Supreme Court held

> *'[18]……. As the Judicial Committee of the Privy Council emphasized in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:*
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> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.'*

[19] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[20] These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court (*vide* ***Rasaku*****)**

Summary of facts

[21] The single Judge in the leave to appeal ruling had adequately summarized the facts of the case as follows.

> *'[4] At trial, the complainant, her two brothers and her mother gave evidence. The appellant also gave evidence and called one witness. He was a builder and owned a construction business. The complainant and the appellant were related. She was his niece. The abuse started when she was 12 years old and in Year 6. Her evidence was that in 2005, she accompanied the appellant at his request to clean a house in Sabeto that was under construction with the permission of her grandmother. While she was doing the house chores, the appellant grabbed her into a bedroom and prevented her from leaving the room by closing the door. He had sexual intercourse with her after putting on a condom. She bled during the sexual intercourse. After having sexual intercourse, the appellant threatened the complainant that he would kill her mother if she complained. The complainant said she did not complain to anyone when she returned home because of the threat the appellant had made to harm her family.*
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> *[5] The second incident occurred in 2006. The circumstances were similar to the first incident. The complainant said she did not complain to anyone when she returned home because she feared the appellant.*
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> *[6] On 17 January 2007, the appellant came to her home. She was home with her two brothers. Her mother was not at home. The appellant offered $5.00 to the boys and told them to get snacks from the shop. After the boys had left home, the appellant lured the complainant buy offering candies and then had sexual intercourse with her in one of the bedrooms. The brothers told the court that they were told to go to shop when the appellant came home on 17 January 2007. The complainant's mother gave evidence that she found it strange that the appellant told the boys to go to shop buy candies when she knew that the appellant had come to her home from town and he could have bought the candies while he was in town. Upon prodding, the complainant told her about the sexual abuse. She reported the matter.*
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> *[7] In this evidence, the appellant denied the allegations. He told the court that the allegations were fabricated by the complainant's mother after their relationship went sour in 2006 following an affair they had since 2004. The appellant's witness was one of his employees. His evidence wads of no significance.'*

[22] I shall consider the appellant's first ground of appeal as a renewed ground because a ground of appeal almost similar to that had been considered by the single Judge and leave had been refused on that ground on 13 February 2017. At that time there was no Practice Direction prescribing the period within which the renewal of a refused ground of appeal had to be done. Section 35(3) of the Court of Appeal anyway does not set out the period within which a renewal application should be filed. Thus, it is fair to consider the first ground of appeal as a renewed ground of appeal under Rule 35(3) of the Court of Appeal Act.

01st Ground of Appeal

'*That the Learned trial Magistrate erred in Law when he failed to properly direct himself of the effect of the contradictions in the Prosecution Witnesses' testimony and or the law of inconsistent or omission of the evidence.'*

[23] The Court of Appeal examined the law relating to omissions, contradictions and discrepancies in **Nadim v State** AAU0080 of 2011: 2 October 2015 [2015] FJCA 130 and stated

> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.'*

[24] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)

> *'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ..... (3). ..... It is unrealistic to expect a witness to be a human tape recorder;'*

[25] In **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98 the Court of Appeal once again quoted from the following judgments of the Indian Supreme Court in relation to the importance attached to discrepancies, deficiencies, drawbacks, embellishments or improvements and other infirmities in evaluating the evidence.

> ***'**[107] **State of UP v. M K Anthony** (1985) 1 SCC 505*
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> *'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'*
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> *[108] **State of UP v. Naresh** (2011) 4 SCC 324*
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> *'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.'*

[26] The appellant's written submissions before this Court have highlighted some 'contradictions', 'inconsistencies' and 'omissions' in the complainant's evidence. He particularly complains that it appears from her statement to the police that the complainant had told that she had cried, the appellant had touched her breast and the appellant had told her that he would teach her how to have sex. The alleged inconsistency is that the complainant had not stated such acts to court at the trial but only to the police.

[27] It is true that these mattes had been elicited under cross-examination by the appellant's counsel but I cannot understand how they could be said to be 'going to the root' of the matter. The complainant, who was 12 years old when the first incident took place, had

given evidence in 2012 *i.e.* 05-07 years after the incidents that happened in 2005, 2006 and 2007 and it is quite possible that she may have forgotten some details which in no way affect the essential elements of the offence of rape or her credibility as a witness.

[28] In my mind, the learned Magistrate had considered these matters in the correct perspective and had correct legal principles in his mind throughout the judgment. He had stated as follows.

> *'18. I further bear in mind that this is an old case. The allegation was alleged to have occurred from 2005, 2006 and 2007. Hence there are bound to be contradictions and discrepancies in earlier out of court statements when contrasted with a witness testimony in court. That is understandable due to the inherent weakness in as far as human memory is concerned. The existence of discrepancies or contradictions doesn't mean that a witness is lying. Apparently contradictions may relate only to peripheral matters or go to the core subject in dispute. Nonetheless all the evidence of the witness must be considered in totality including their demeanor before deciding on whether their evidence is credible or otherwise.'*
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> *'19. I have also borne in mind that in cases of rape and other sexual related offences the need for corroboration is no longer required. That is clearly stated in section 129 of the Criminal Procedure Decree. Thus the court can acquit or convict on the basis of, whether it disbelieves or believed complainant's evidence alone.'*

[29] The appellant is also arguing that given the complainant's evidence that the appellant had dragged her on the concrete floor in 2005 and 2006 she should have suffered injuries. But she had said that she did not receive injuries. The complainant had never said that she was dragged along the concrete floor. *'He dragged me into the room'* does not mean that her body was dragged along the floor although the floor was concrete. In addition, the appellant contends that the neighbors at Sabeto should have heard the complainant crying if she had raised cries. However, she had not told in evidence that she cried in such a loud noise so as to be heard by neighbors. What she had told court was that the appellant had asked her to keep quiet. Nor is there is evidence as to the presence of neighbors at the time of the day when the acts of rape took place. Finally, the appellant argues that inside a building under construction there could not have been a bed and that the blood coming out of her vagina after the first act of sexual intercourse would have left blood stains on the bed. The complainant was affirmative that there was a bed on which the

appellant raped her and he wiped the blood coming out of her vagina with a hand towel and thereafter burnt it. In my view, these arguments do not merit any further or serious consideration at this stage and I reject all of them.

[30] Moreover, I find that the learned Magistrate had carefully and in detail analyzed the totality of the evidence in the impugned Judgment and drawn correct conclusions therefrom. He said finally

> *'36. On the basis of the evidence adduced before the court I'm satisfied beyond reasonable doubt that accused had unlawful carnal knowledge with PW1 without her consent, as mentioned in counts, 1, 2 and 3 of the charge.'*

[31] Therefore, I am in full agreement with the single Judge who refused leave on this ground of appeal based on alleged contradictions, inconsistencies and omissions of the prosecution witnesses, when he said

> *'[11] In his judgment, the learned Magistrate expressly considered the inconsistencies in the complainant's evidence and found them as peripheral and not going to the root of the matter. Ground 4 is unarguable'.*

[32] Therefore, there is no real prospect of success in the first ground of appeal and extension of time is therefore refused and consequently leave to appeal too is refused.

> *<u>02nd ground of appeal</u>*
>
> *'That the conviction was unsafe and unsatisfactory having regard to the entire sum or totality of the evidence at trial, in particular:*
> *vi. Inconsistent date of incident. (AB 132-133)*
> *vii. Evidence was discredited In Cross-examination. (AB 134-138)*
> *viii. Evidence of having chances to complain the matter (AB 136)*
> *ix. Evidence of Complainant and other witnesses were contradicting with each other.*
> *x. Incident reported after 021 days without any cogent reason.*

[33] As already pointed out this is a new ground of appeal and the appellant has to first obtain an extension of time and leave to appeal for this Court to consider his appeal on this ground. I shall proceed to consider it in the light of guidelines in **Rasaku v State** (supra), **Kumar v State; Sinu v State** (supra) and ***Nasila***.

Reasons for the failure to file within time

[34] There is no affidavit filed by the appellant explaining as to why the fresh grounds of appeal were not taken up from 20 January 2015 to 05 June 2019. The appellant was represented by his counsel till the end of the trial. Two sets of amended grounds of appeal had been filed by his attorneys from time to time prior to the last set of grounds of appeal now before this Court. Thus, no reasons have been placed before this Court for the long delay of over 04 years.

The length of the delay

[35] The 02nd ground of appeal against conviction is late by over 04 years and therefore, the delay is *prima facie* substantial and unacceptable.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

[36] In **Nasila v State** AAU0004 of 2011:6 June 2019 [2019] FJCA 84 the Court of Appeal laid down the test to be satisfied in this regard as follows.

> *'[23] ……..in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a very substantial delay such as this does not deserve to reach the stage of full court hearing.'*

[37] It is well settled that in Fiji no conviction would be set aside on the ground that it is unsafe and unsatisfactory but on any of the grounds set out in section 23 of the Court of Appeal Act which permits the appellate court to allow an appeal only if it thinks that the verdict should be set aside (i) either because it is unreasonable or cannot be supported

having regard to the evidence or (ii) if it thinks that the judgment should be set aside on the ground of a wrong decision on any question of law or on any ground involving a miscarriage of justice. Still, the proviso to section 23 empowers the court to dismiss the appeal even if the point raised in appeal might be decided in the appellant's favour but no substantial miscarriage of justice has occurred. If an appeal cannot reach the threshold of *'real prospect of success'*, then obviously it would fall far short of satisfying the standard in any of the grounds set out in section 23 of the Court of Appeal Act.

[38] In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words which were echoed in **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98.

> *'Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.*
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> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
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> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[39] Therefore, the very formulation of the above ground of appeal is misconceived. However, if I may in the interest of justice refer to the matters highlighted under the second ground of appeal, my observations would be as follows.

[40] The appellant's complaint emanates from the complainant's mother's evidence that the complainant had told her that the appellant used to beat her and once took her to a hotel in Votualevu which the complainant had not disclosed in her evidence. The prosecution had not asked and the defense had not confronted the complainant with this piece of evidence at all. Therefore, it is not reasonable to discredit the complainant based on her mother's evidence. In fact the defense had not probed the mother on this evidence any further in cross-examination for obvious reasons.

[41] There is no inconsistency of the date of the last incident as alleged by the appellant. The appellant seems to be complaining of the denial by the complainant that she had gone with the appellant to buy kerosene on the 16th December, the day before the last act of alleged rape. Her mother and two brothers had said that the appellant had gone with the complainant on the 16th and brought kerosene at the request of the mother who of course was still in the dark of the sexual abuse by the appellant on her daughter.

[42] The learned Magistrate paid his attention to this issue in the judgment and I find no serious error complaint in the manner in which he had dealt with it.

> *'I note discrepancies in PW1's evidence in relation to the day she denied she went with accused to buy kerosene on 16th January 2007. PW2, PW3 and PW4 told the court that PW1 went with accused to buy kerosene on the said date. Whilst I accept that there is inconsistency, I consider this as peripheral matter and it doesn't have a bearing on the subject matter in issue.'*
>
> *'I also noted some in consistence in relation to the evidence that accused came with PW4 to Togomasi on 16th January 2007. This inconsistency I consider as peripheral only and do not affect the subject matter in issue.'*

[43] The appellant is also challenging the complainant's evidence on the basis that it was discredited under cross-examination. This aspect has already been dealt with under the first ground of appeal and needs no further discussion except quoting from the impugned Judgment. The learned Magistrate had said of this position of the appellant as follows.

> *'It is to be noted that PW 1 was cross examined at length. She maintained that accused had forceful sexual intercourse with her. She remained firm and was consistent throughout and never waived from her allegation. Accused had threatened to kill her mother and for her not to reveal the matter to anyone. She was also slapped during one of the incident and was scared.'*

[44] The appellant also has brought up the point that the complainant had opportunities to complain of the acts of rape. He seems to be suggesting that the complainant's compliant made on 17 December 2007 was belated in so far as the acts that allegedly took place in July 2005 and 2006 are concerned, for the last incident anyway happened on the 17 December 2007.

[45] The complainant's consistent position has been that she was afraid to make any complaint as the appellant had threatened to kill her mother and the family. It appears that she had not volunteered to make any complaint even on the 17 December. The suspicious circumstances surrounding the appellant's visit to the house on the 17th (as he had already visited them on the previous day) and his sending the complaint's two younger brothers away to a shop leaving only him and the complainant at home, had prompted the mother to question her privately as to why the appellant came and the complainant then divulged what had happened between her and the appellant on that day and on previous occasions.

[46] The evidence of the complainant was that when the appellant left the house at about 4.00 p.m. on the 17th December he had said that he would pick her up on the coming Saturday. If the appellant is trying even remotely to insinuate (I am not suggesting that it be the case) that the complainant could have been a willing party to the acts of sexual intercourse and that explains why she never made any complaints despite the availability of opportunities, it would not help him as she, being a minor could not be a consenting party. If not, the circumstances under which the sexual relationship between the appellant and the complainant remained hidden and came to the surface belatedly should not surprise anyone.

[47] This aspect of the appellant's complaint had not escaped the attention of the learned Magistrate at the trial stage. He had dealt with it as follows.

> *'Moreover the court accepts that the fist complaint by PW1 and PW4 was made on 17th January 2007 which is about 2 years from the first alleged incident. PW1 stated that she didn't complain to anyone as accused had threatened to kill her mother and she was scared. It is pertinent to note that PW1 was only 12 years old when the first alleged incident occurred. Her reaction and the fear to not complain due to accused threats bearing in mind her vulnerable age was rational. The court will accept PW1's reasons for not complaining as reasonable explanation for the belated complaint. On the evidence I cannot accept that PW1 didn't complaint because the incident never happened and this was a set up by PW4. PW4 denied having any relationship with accused and also denied demanding money from accused.'*

[48] The appellant had once again raised his concern of the complainant and the other witnesses contradicting each other. This matter too had been dealt with under the first heading and needs no further consideration.

[49] Finally, the complainant argues that the fact that the mother had taken 21 days to report the incidents to the police without cogent reasons raises doubt whether the allegation was fabricated. The complainant's mother had said in evidence that since she was working she asked her mother to make a complaint to the police and she had given her statement on 07 February 2007. It appears that after the complainant had divulged what was hitherto a secret, to her mother, the latter had asked her mother to check with the appellant and his wife who was her elder sister. Thereafter, the appellant, his wife and son had come to the complainant's mother's work place and asked that a medical checkup be done. The complainant's mother claims to have written to the Police Commissioner inquiring as to why her daughter's case was taking so long. However, in the light of the complainant's mother's explanation as to the delay she had not been challenged by the defense on her evidence. Perhaps, the defense thought that it was prudent not to probe it any further as the appellant and his family appeared to have been part of or at least have been in the knowhow of the unfolding circumstances in the aftermath of the complainant's revelation on 17 January 2007. It had not been at least suggested to the complainant's mother that the delay was because she was fabricating the allegation.

[50] It is in evidence that the complainant had been subjected to a medical examination but the medical report had not been produced. Though, there appeared to have been a common ground between the prosecution and defense to produce the medical report by mutual consent, later the defense and even the prosecution had wanted the doctor's presence in court to clarify certain matters but the prosecution had not been able to locate and get down the doctor. Having granted several days for the prosecution to secure the doctor's attendance, the learned Magistrate had finally decided to bring the trial to a finality as the proceedings had already taken a long time. Though the prosecutor had informed that the medical findings were to the effect that there had been lacerations and the complainant's hymen had been not intact, the learned Magistrate had quite rightly decided not to speculate on the medical findings in the absence of the medical report as an exhibit at the trial.

[51] The appellant's evidence reveals that he had admittedly taken the complainant to Sabeto where the two acts of rape relating to count one and two had taken place. He had also admitted having visited the complainant's house on 17 January 2007, the day when the third act of rape allegedly took place. He had given his own version of these events. However, those admissions lend support to the general tenor of the complainant's evidence.

[52] The reason given by the appellant at the trial for him having been falsely implicated by the complainant's mother using her daughter is his refusal to give the money demanded by the former, whereas in his caution interview the appellant is supposed to have told the police that the reason for the alleged false implication is because he had told the complainant that he would divulge to the family the fact that the complainant had told him of her mothers' then *de fcacto* partner named Sadhu having had sexual intercourse twice with the complainant before. Yet, the appellant had not informed anyone of such a sexual relationship between Sadhu and the complainant to trigger such a false implication by the complainant. However, he had testified at the trial that he had a very good relationship with the complainant and he treated her like his daughter. In this connection I cannot find fault with the learned Magistrate when he said in the judgment as follows.

' 31. It is clear from accused evidence that he had good relationship with PW1 and he treated PW1 as a daughter. That being the case why would PW1 than make a very serious allegation that accused raped her? As the court sees it, this is not a normal complaint that you would expect a niece to make against her uncle who treats her like a daughter, unless it actually happened.

'32. Further another reason why I am (sic) not convinced with accused story was because accused didn't complaint or lodge any report against Sadhu to Police when PW1 alleged that Sadhu to Police when PW1 alleged that Sadhu had sex with her twice. The reasons given by accused to not report to police as he didn't want to interfere defies logic and is not a spontaneous responses of a sensible person especially the accused who has indicated to court that he treats PW1 as a daughter. The way he behaved by failing to report was irrational and unnatural.

[53] Therefore, there is no real prospect of success in the second ground of appeal and extension of time is therefore refused and consequently leave to appeal too is refused.

If time is enlarged, will the respondent be unfairly prejudiced.

[54] The respondent in this appeal is the State and the State would be unfairly prejudiced as a result of an extension of time. For example, if there is going to be a retrial a long delay such as over 04 years could mean that there is a possibility that some of the vital witnesses for the prosecution, particularly the police officers may not be available due to reasons such as oversees duty etc. which will hamper the conduct of the prosecution and unfairly prejudice the State. It is already on record that the prosecution had been unable to find the doctor at the trial despite making a substantial effort.

[55] In the light of the above discussion I refuse to grant enlargement of time as far as the 02nd ground of appeal against conviction is concerned. Logically, leave to appeal should also be refused.

05th ground of appeal against sentence

'That the Learned Sentencing Judge erred in law and facts when he failed to consider the tariff for the offence of Rape that imposed in year 2005 to 2007 when the alleged offence was committed to be consistent of be sentences passed by various Court in those years.'

[56] It is clear that the appellant has come up with this ground of appeal for the first time. What the single Judge considered for leave were two different grounds of appeal against sentence. Therefore, as already pointed out the appellant has to pass the threshold applicable in the case of an extension of time to persuade this Court to grant enlargement of time and then leave to appeal for it to consider the appeal against sentence.

[57] My previous discussion and conclusions on the aspect of reasons for the delay, the length of the delay and whether prejudice will be caused to the respondent are equally applicable to the new sentence appeal ground too. I shall answer all of them in the same way I have done above in respect of the fresh ground of appeal against sentence too. However, I shall consider the aspect of merit afresh on the new sentence ground.

[58] In considering whether the appellant has a real prospect of success on merits in the sentence ground of appeal, the appellant has to show that the learned High Court Judge has committed a sentencing error within the legally recognised parameters. Appellate courts will interfere with a sentence if it is demonstrated that the trial Judge made one of the following errors;

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

(Vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936) 55 CLR 499 as adopted in **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21).

[59] The appellant's complaint is that he should have been sentenced in terms of the tariff for rape existing at the time the offences were committed and not according to the tariff at the time of sentencing. He relies on Article 28(1) of the 1997 Constitution of Fiji Islands, Article 14(2)(n) of the 2013 Constitution of the Republic of Fiji, **Yunus v State** CAV 0008 of 2011:24 April 2013 [2013] FJSC 3, **Silatolu v The State** AAU0024 of 2003S:10 March 2006 [2006] FJCA 13 and **Kumar v State** CAV0017 of 2018: 2 November 2018 [2018] FJSC 30 to buttress his argument based on the principle of non-retrospectivity.

[60] The Courts in Fiji for many years had taken 05 years as the starting point with no aggravating or mitigating circumstances for rape committed by an adult until it was increased to 07 years in **Kasim v State** AAU 0021 of 93s: 27 May 1994 [1994] FJCA 25. The tariff was considered to be from 07-15 years (see per Gates, J in **State v. Marawa** HAC 0016T of 2003S:23 April 2004 [2004] FJHC 338. In **Drotini v The State** AAU0001of 2005S: 24 March 2006 [2006] FJCA 26 the starting point for cases of rape committed by fathers or step fathers was increased to 10 years and called for a substantial increase in the final sentence when aggravating circumstances are present. The Court of Appeal increased the accepted range of sentence for rape of juveniles (under the age of 18 years) to 10-16 years [vide **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18] as the heavy sentences had still not deterred would be 'family rapists' and still more and more of such heinous crimes come before courts. The Supreme Court in **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12] confirmed that the tariff for rape of a child is between 10-16 years which was raised to be between 11-20 years imprisonment in **Aitcheson v State** CAV0012 of 2018: 02 November 2018 [2018] FJSC 29 by the Supreme Court stating that increasing prevalence of these crimes characterised by disturbing aggravating circumstances means the court must consider widening the tariff for rape against children.

[61] Therefore, the tariff that was applicable when the sentence was handed down to the appellant on 20 February 2015 was 10-16 years of imprisonment and it became 11-20 years of imprisonment since 02 November 2018. The learned High Court Judge had considered the above decisions (except ***Aitcheson***) and taken 11 years as the starting point and considering aggravating and mitigating circumstances and the period of remand, ended up with a sentence of 13 years, 11 months and 10 days. No valid criticism could be directed at the sentencing process and the manner in which the High Court Judge had used his sentencing discretion. There is no error in the sentence as per ***Naisua*** guidelines and I fully agree with the following conclusion of the single Judge in his leave to appeal ruling.

> *' 17……The sentence of 13 years 11 months and 10 days imprisonment for rape of a 12 year old girl in a contested case is within the tariff for child rape (Raj v State unreported Cr. App No. AAU0038 of 2010; 5 March 2014). The rape was repeated over a period of two years. The appellant was a relative (uncle) and 53 years old. The breach of trust was gross. The only mitigating*

factor was the appellant's previous good character. Twenty days remand period was considered. Deterrence and denunciation were the primary objectives of the punishment. The sentence reflects these objectives. There is no arguable error in the exercise of the learned Judge's sentencing discretion.

[62] The principle of non-retrospectivity is well known (For example see Article 15 of the International Convention on Civil and Political Rights, per Lord Diplock in **Black Clawson International v Paloerwele Waldron Aschaffenburg** [1975] AC 591, ***Commentaries on the Laws of England by*** William Blackstone, ***The Rule of Law***, Lord Bingham [Tom Bingham, *The Rule of Law* (Penguin UK, 2011)] and per Toohey J in **Polyukhovich v Commonwealth (Polyukhovich)** (1991) 172 CLR 501, 608).

[63] The Court of Appeal in **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 discussed this matter in great detail and held

"[39] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he did it. Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'."

*'[40] …… that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. ……. Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation. Therefore, the new tariff that was set out in **Gordon Aitcheson** (supra) could be retrospectively applied to the instant case. The punishment for the substantive offence of rape in terms of Section 207 (1) (2) of the Crimes Act 2009 is life imprisonment which remains the same before and after **Gordon Aitcheson.**'*

[64] ***Silatolu*** is not applicable here as it had dealt with the retrospectivity of a statutory provision whereas in the present case there has been no change to the statutory regime. The presumption against retrospective legislation would not apply to the change of tariff for rape as tariff is not part of substantive law but of procedural regime. In ***Yunus*** the Supreme Court said that *'there can be no doubt that where an amending legislation related to procedure only, as in The King v Chandra Dharma (1905) 2 K. B. 335 it would have retrospective effect…..'*

[65] In **Kumar v State** CAV0017 of 2018: 2 November 2018 [2018] FJSC 30 Keith, J had made the following observations without argument from either counsel and conceded by the counsel for the State. However, it appears from the written submissions filed in this case that the State does not agree with the proposition of law that had been conceded in ***Kumar***. In any event ***Kumar*** did not deal with the kind of argument taken up by the appellant in this appeal. Nor did it **decide** on the constitutionality or retrospectivity points.

> *'That was not altogether surprising. If the Court decided that the current sentencing practice for the rape of children and juveniles should be reviewed, any new sentencing practice would not apply to Kumar. It would only apply to offenders whose offences took place after the promulgation of our judgment. Dato' Alagendra conceded that when the Court put that proposition to her.'*

[66] A sentencing tariff set by common law, which is not static, does not amount to a penalty prescribed by a statute but a mere procedural arrangement. Therefore, even section 14(2)(n) of the Constitution which states *'that every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing',* has no application to tariff as the article contemplates a change in the prescribed punishment. As pointed out already the punishment for rape has not changed. If the Appellant's argument is correct in the sense that tariff set by court has the force of a statutory provision the sentencing judges will never be able to go outside the tariff whatever the circumstances of the case may be.

[67] Setting a tariff is more to do with procedural law rather than substantive law and an exception to the common law rule that a statute ought not to be given a retrospective effect. In **Singh v State** [2004] FJCA 27; AAU0009.2004 (16 July 2004), the Court of Appeal held

> *"...It inevitably follows from these conclusions that the new section 220 became applicable to the Appellant when the Amendment Act came into force on 13 October 2003. In his case it had a retrospective effect. Plainly the new section 220 is a procedural provision. It prescribes the manner in which the trial of a past offence may be conducted. It is unquestionably, in our view, a provision which is an exception to the common law rule that a statute ought not be given a retrospective effect."*

[68] In **Roadway v The Queen** (1990) 169 CLR 515 emphasising the rule set by Dixon CJ in **Maxwell v Murphy** (1957) (9 CLR 261, 267) the High Court of Australia held,

> '*that the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction.* ***It is said that statutes dealing with procedure are an exception to the rule and they should be given a retrospective operation.*** *It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of the statutes which affect mere matters of procedure". (emphasis added)*

[69] The State has argued in this appeal that section 4(2) of the Sentencing and Penalties Act requires the sentencing judge to have regard to the current sentencing practice which logically and rationally include current tariff regime. Therefore, the decisive date is not when the accused commits the offence but when he is sentenced. In other words an accused would be sentenced according to the tariff applicable as at the date of sentencing and not at the date of offending.

[70] The State has sought to meet the appellant's argument based on Article 14(2)(n) of the Constitution by pointing out that 'prescribed punishment' therein means the maximum statutory penalty and cited some decisions on Article 7(1) of the European Convention on Human Rights which is similar to Article 14(2)(n) of the Constitution. Article 7 (1) provides:

> *"No punishment without law*
>
> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

[71] **Regina v. Secretary of State for the Home Department (Appellant) ex parte Uttley (Respondent)** [2004] UKHL 38, [2005] 1 Cr.App.R.(S) 91 the House of Lords following the decision of the European Court of Human Rights in **Coeme and others v Belgium** (22 June 2000), has held on the meaning of Article 7(1) of the European Convention on Human Rights as follows

'It follows that article 7 (1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that his offence was committed.'

'22. The maximum sentence which could be imposed for rape at the time that the respondent committed the rapes for which he was convicted was life imprisonment. That was the 'applicable' penalty for the purposes of article 7 (1)'

[72] ***R v H (J)*** [2012] 1 WLR 1416 provided useful guidance in sentencing and an authority to state that the sentencing judge should apply the legislative provisions, and have regard to any relevant guidelines, applicable as at the date of sentencing, while bearing in mind that the sentence is limited to the maximum sentence available at the time that the offence was committed. The Court of Appeal remarked that

'In the result therefore in historic cases, provided sentences fall within or do not exceed the maximum sentence which could lawfully have been imposed at the date when the offence was committed, neither the retrospectivity principle nor article 7 of the Convention are contravened.'

[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable.

[74] I am very much persuaded by the above arguments of the State and the decision of the Court of Appeal in **Narayan v State** (supra) seems vindicated and justified in the light of the above line of thinking. In ***Narayan*** the Court of Appeal said

'[53] Therefore it could be safely assumed that the new tariff would be applicable to all the accused in the original courts and appellants or petitioners in appellate courts whose sentences come up for consideration or decision after the date of the Judgment in ***Gordon Aitcheson*** *i.e. 02 November 2018. To hold otherwise, means that the effect of the enhanced tariff in* ***Gordon Aitcheson*** *would be rendered insignificant. The appellant cannot argue that he may not have committed the acts of rape had he known that the tariff would be*

increased in the future. His conduct was anyway criminal at the time of its commission.

[54] Therefore, the Appellant in this appeal is liable to be dealt with under the new tariff introduced by the Supreme Court in ***Gordon Aitcheson****……'*

[75] Unfortunately, Keith, J in the Supreme Court in **Kumar v State** (supra) and in **Prasad v State** CAV0024 of 2018: 25 April 2019 [2019] FJSC 3 had not been afforded the benefit of the above arguments and the decisions of the House of Lords and the Court of Appeal (UK) interpreting Article 7(1) of the European Convention on Human Rights. The State considers this point in the two judgments to have been decided *per incuriam*. Non-availability of the two judgments of the House of Lords and the Court of Appeal perhaps prompted His Lordship Keith, J to say the following in ***Prasad*** also which His Lordship had earlier said in ***Kumar.***

'if the court gave a guideline judgment increasing the tariff for sentencing in rape cases involving children and juveniles, the new tariff should only apply to offenders whose offences took place after the promulgation of the court's judgment. Otherwise, the new tariff would be applied retrospectively, and some people might say that that would not only be unfair to accused persons, but might also be a breach of the principle of non-retrospectivity which lies behind Art 14(2) (n) of the Constitution.'

[76] Therefore, there is no real prospect of success in the fresh ground of appeal against sentence. Accordingly, extension of time is refused and consequently leave to appeal too is refused.

[77] The Appellant and his counsel were put on notice the powers this Court is vested with under section 23(3) of the Court of Appeal Act as the court was requested by the State to consider enhancing the sentence. Such a warning has always been considered a fair procedure (vide ***Gordon Aitcheson,*** **Ram Chandra Naidu v R** [1974] Fiji LR 63; **Christine Doreen Skipper v R** Court of Appeal, Cr. App. 70/1978; **Kumar v The State** AAU0018J of 2005: 29 July 2005 [2005] FJCA 54 and **Tevita Poese v The State** Court of Appeal Crim. App. No. AAU0010.2005S, 25th November 2005).

[78] In ***Gordon Aitcheson*** the Supreme Court said

> *'[66] At this juncture, it would be pertinent to cite the principle of law enunciated by Justice Gates (as he then was) in* ***State v Marawa*** *[2004] FJHC 338, having cited with approval* ***Mohammed Kasim v State****;* ***Roberts and Roberts*** *(1992) 4 Crim.App. (s) 8,* ***State v Turagabeci*** *(1996) FJHC 173 and* ***Koroi v State*** *[2002] FJHC 152 at 10-11:-*
>
> *"Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and by meting out harsh sentences.'*

[79] I am also conscious of the strong sentiments expressed in many a decision (for example see ***Kasim, Drotini, Raj,*** **The State of Punjab vs Gurmit Singh & others** 1996 AIR 1393, 1996 SCC (2) 384, **Lokesh Mishra v. State of NCT Delhi** CRL. A. 768/2010 decided on 12 March 2014 by the High Court of Delhi, **Matasavui v State** Criminal Appeal No.AAU0036 of 2013: 30 September 2016 [2016] FJCA 118) on ever increasing surge in sexual crimes against children, juveniles, teenagers and adults of both sexes.

[80] However, I do not propose to enhance the appellant's sentence for two reasons. Firstly, he is not being granted enlargement of time and consequently leave to appeal. Secondly, considering all the circumstances I am of the view, as the Court of Appeal remarked in ***Drotini,*** that though the facts of this case may have (as opposed to 'should have') merited a sentence of over 14 years I do not consider the sentence imposed as being so manifestly lenient for me to interfere as quantum alone can rarely be a ground for the intervention of this Court (see the SC decision in ***Raj***).

[81] Accordingly, I conclude that (i) the appeal against conviction stands dismissed, (ii) extension of time on the new ground of appeal against conviction is refused (iii) extension of time on the new ground of appeal against sentence is refused.

Nawana, JA

[82] I agree with the conclusions and the reasoning of Prematilaka, JA that the appeal should be dismissed.

The Orders of the Court are:

1. *Appeal on conviction is dismissed.*
2. *Conviction is affirmed.*
3. *Enlargement of time is refused on the new ground of appeal against conviction.*
4. *Leave to appeal is refused on the new ground of appeal against conviction.*
5. *Enlargement of time is refused on the new ground of appeal against sentence.*
6. *Leave to appeal is refused on the new ground of appeal against sentence.*

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

.....

Hon. Justice P. Nawana
JUSTICE OF APPEAL

JUSTICE OF APPEAL