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

CRIMINAL APPEAL NO. AAU 157 of 2015 and AAU 05 of 2016
[In the High Court at Suva Case No. HAC 205 of 2014S]

BETWEEN	:	**SEREVI DEGEI**
	:	**JOVECI RABUTORO**
	:	**LEDUA RARAWA**
	:	**ETONIA VOSA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Perera, JA**
Counsel	:	**Mr. S. Waqainabete for the 01st Appellant**
	:	**Mr. M. Fesaitu for the 02nd and 03rd Appellants**
	:	**Mr. R. Gounder for the 04th Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**14 May 2021**
Date of Judgment	:	**03 June 2021**

JUDGMENT

Prematilaka, JA

[1] The appellants had been indicted in the High Court at Suva with four separate counts of rape (*i.e.* each appellant facing one count of rape) contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Ritz Nightclub, Suva in the Central Division on 26 June 2014.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellants were guilty of their respective counts of rape. The learned trial judge had agreed with the assessors, convicted the appellants as charged and sentenced them to imprisonment of 14 years with a non-parole period of 13 years on 10 December 2015.

[3] The first three appellants' application for leave to appeal against conviction had been timely (AAU 157 of 2015). The fourth appellant's application for leave to appeal against conviction and sentence had also been timely (AAU 05 of 2016). However, he had subsequently tendered an application to abandon the sentence appeal which was considered by the full court along with the appeals against conviction. Upon questioning the fourth appellant the court was satisfied with the requirements as set down in **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) to allow the abandonment of his sentence appeal. Accordingly, the withdrawal of the fourth appellant's sentence appeal is hereby allowed.

01st appellant (02nd accused)

[4] Two grounds of appeal against conviction had been canvased by his counsel on behalf of the appellant at the leave to appeal stage with the single Judge granting leave on both grounds of appeal on 27 November 2017. The grounds of appeal placed before the single Judge read as follows:

> *'**Ground 1***
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> *The Learned Trial Judge erred in law and in fact when he did not consider the fact that there was more than reasonable doubt in the respondent's case where PW2 Salanieta Radaniva agreed under cross examination that in the whole time on 26/6/14, the appellant was just doing his work at the dance floor and also the fact that she told the police officer who was conducting the identification parade that it was not the appellant as the appellant was just doing his work at the dance floor.*
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> ***Ground 2***
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> *The Learned Trial Judge erred in law and in fact when he did not consider the consistency of the evidence of the appellant which was supported by PW2 Salanieta Radaniva's evidence regarding the total non-involvement and the absence of your appellant from the Karaoke room where the alleged rape took place.'*

02nd appellant (01st accused)

[5] A single ground of appeal against conviction had been canvased by his counsel on behalf of the appellant at the leave stage with the single Judge granting leave to appeal. The sole ground of appeal placed before the single Judge read as follows:

> *'The learned trial Judge erred in law and in fact when he did not adequately address the issue of identification on the following:*
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> *i.Any other evidence relating to the identification of the appellant;*
> *ii.Propriety of the identification parade.'*

03rd appellant (03rd accused)

[6] Three grounds of appeal against conviction had been canvased by the appellant's counsel at the leave stage with the single Judge granting leave to appeal on all of them which read as follows:

> *"1. The appellant was prejudiced upon the learned trial Judge informing the assessors in his summing up that a prima facie case was found at the end of the prosecution case.*
>
> *2. The learned trial Judge erred in law and in fact in not directing the assessors on the appellant's case fairly and objectively causing a miscarriage of justice.*
>
> *3. The learned trial Judge failed to properly evaluate and consider the weakness in the identification evidence against the appellant resulting in a miscarriage of justice."*

04th appellant (04th accused)

[7] Two grounds of appeal against conviction had been canvased by the appellant's counsel at the leave stage and the single Judge had granted leave only on the first ground. The appellant has not renewed the second ground of appeal before the full court. The grounds of appeal urged were as follows:

"1. That the learned trial Judge erred in law and fact when he allowed the State witness namely Adi Ema Barbara Toganivalu during the trial to identify the appellant in the dock without prior foundation of identity parade or photograph identification.

2. That the learned trial Judge erred in law and fact when he failed to give a fair and balanced summing up by not adequately putting the medical evidence to the assessors."

[8] It appears that all appellants are contesting, more or less, different aspects of identification in challenging the conviction or at least the question of identification runs throughout the appeals as the most fundamental issue embedded, directly or indirectly, in all grounds of appeal. Therefore, it is expedient to consider the matter of identification in respect of all appellants first.

Evidence summarized by the learned trial judge in the summing-up.

[9] The trial judge has summarized the evidence against each of the appellants as follows:

14. 'The prosecution's case was as follows. On 26 June 2014, the complainant was 20 years old and a student at the University of the South Pacific. Mr. Joveci Rabutoro (Accounts No. 1) was 32 years old and single. He had worked for the Ritz Nightclub as a bouncer for the previous four years. Mr. Serevi Degei (Accused No. 2) was 36 years old, had a de facto wife with a baby son. He had worked for the Ritz Nightclub as a bouncer for the previous two years. Mr. Ledua Rarawa (Accused No. 3) was 27 years old, married with a young son. He had worked for the Ritz Nightclub as a doorman for the previous four years. Mr. Etonia Vosa (Accused No. 4) was 42 years old, married with three children. He worked as a bouncer for the Ritz Nightclub at the time.

15. According to the prosecution, on 25 June 2014 (Wednesday) the complainant and five of her friends were having a party at their Mead Road home in Nabua. They consumed among themselves nine cans of rum and cola. Thereafter, they went to the Ritz Nightclub and arrived there at 12.30am on 26 June 2014 (Thursday). At the nightclub, they continued drinking after ordering four jugs of rum and cola. The complainant danced for a while, and then went to the toilet. After using the toilet, she came outside. According to the prosecution, Accused No. 4 was standing there. He confronted the complainant. The lights were bright. According to the prosecution, the complainant was not excessively drunk.

16. *Accused No. 4 repeatedly punched the complainant on the head and other parts of her body for about 5 minutes. The complainant temporarily blacked out. Accused No. 4 lifted the complainant onto his shoulders and carried her to the Karaoke Bar. He dumped her on a settee which could seat three people. According to the prosecution, Accused No. 4 continued to punch her on the settee and kicked her on the chest. She resisted to no avail. It would appear she was weakened. Accused No. 4 forcefully took off her pants and panty, parted her legs, went on top of her, inserted his penis into her vagina and had sex with her for about 45 minutes. According to the prosecution, the complainant never gave her consent, and Accused No. 4 knew she was not consenting to sex at the time.*

17. *According to the prosecution, Accused No. 1 was the next person to have sex with the complainant. As soon as Accused No. 4 finished having sex with the complainant, Accused No. 1 came on top of her, inserted his penis into her vagina and had sex with her for 30 minutes. Accused No. 4 assisted Accused No. 1 by forcefully parting the complainant's legs for him. The complainant struggled against Accused No. 1, but to no avail. According to the prosecution, the complainant never consented to sex with Accused No. 1, and he well knew she was not consenting to sex with him at the time.*

18. *After Accused No. 1, the prosecution said, Accused No. 2 was the next one to force himself on the complainant. According to the prosecution, he came into the Bar, banged the complainant's head on the wooden part of the settee, slapped her repeatedly on the face, and forcefully inserted his penis into her vagina, without her consent, for about 30 minutes. The complainant resisted him to no avail. According to the prosecution, Accused No. 2 well knew she was not consenting to sex with him at the time.*

19. *The next person to have sex with the complainant was Accused No. 3. According to the prosecution, after Accused No. 2, Accused No. 3 came to the complainant and forcefully inserted his penis into her vagina. He had sex with the complainant for about 10 minutes without her consent. She resisted him to no avail. According to the prosecution, Accused No. 3 well knew the complainant was not consenting to sex with him at the time.*

20. *The matter was later reported to the police. An investigation was carried out. All the accused were brought to court charged with raping the complainant on 26 June 2014 at Ritz Nightclub Suva. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged. That was the case for the prosecution.*

[10] The trial judge had summarized the appellants' cases as follows:

> *'21. On 2 December 2015, on the first day of the trial, the information was put to each accused, in the presence of their counsels. Each of them pleaded not guilty to the charge. In other words, each of the accused denied the rape allegation against them. At the end of the prosecution's case, a prima facie case was found against all accused, wherein they were called upon to make a defence. Accused No. 1 and 3 chose to give sworn evidence and called one witness each. Accused No. 2 chose to give sworn evidence and called no witness. Accused No. 4 chose to remain silent and called no witness. That was their rights.*
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> *22. The defence cases were very simple. As for Accused No. 1, in the "Agreed Facts", dated 3 July 2015, he admitted he was working at the Ritz Nightclub, at the material time, as a bouncer. He admitted going into the Karaoke Bar (the alleged crime scene) three times on 26 June 2014. In his sworn evidence, he denied raping the complainant, at the material time. As for Accused No. 2, in the "Agreed Facts", dated 3 July 2015, he admitted he was working at the Ritz Nightclub, at the material time, as a bouncer. On oath, he denied raping the complainant, at the material time.*
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> *23. As for Accused No. 3, in his "Agreed Facts", dated 3 July 2015, he admitted he was on duty at the Ritz Nightclub on 26 June 2014. He admitted he was working as the "doorman" at the time. On oath, he denied raping the complainant at the material time. As for Accused No. 4, he choose to remain silent and called no witness. That was his right, and no adverse inferences must be made against him for exercising his right to remain silent. The burden to prove his guilt is not on him. It is on the prosecution from the start to the end of the trial.*
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> *24. Because of their not guilty pleas to the information, and because of the above denials, the defence are asking you, as assessors and judges of fact, to find them not guilty as charged, and acquit them accordingly. That was the case for the defence.'*

[11] The trial judge had directed the assessors that to connect the appellants with the crime the prosecution relied on the complainant's evidence and warned that an honest and convincing witness could be mistaken. However, the evidence of PW2, Salanieta Radaniva also goes to establish the identity of some of the appellants which the trial judge had not referred to in the summing-up. The judge had given Turnbull direction to the assessors in order to evaluate the quality of identification and decide whether to accept the complainant's identification evidence (see paragraphs 33 and 34 of the summing-up).

Evidence against the 01st appellant (02nd accused)

[12] The complainant's (PW1) evidence is that the 01st appellant (02nd accused) came on top of her, made love bites, slapped three times on her face, banged her head on the wooden arm of the settee and then inserted his penis inside her vagina. She had struggled and screamed. He had penetrated her vagina for about 30 minutes and she had an unimpeded observation of his face for about 40 minutes. She had first met him on that day and remembered him for what he did to her. PW1 had identified him as the 02nd accused in the dock at the trial (dock identification). She had also identified the 01st appellant 03 days after the incident at an ID parade at Totogo Police Station.

[13] Under cross-examination PW1 had said that the lights in the Karoke Bar were dim, going on and off. The lights made her dizzy but it did not affect her eyesight and saw things clearly. Nor even the punches received earlier affected her eyesight. There were lights from the billiard table as well. Under re-examination she had first said that the lights in the Karoke Bar caused her dizziness but later denied it.

[14] Regarding her identifying the 01st appellant at the Police Identification Parade the complainant had said under cross-examination that she saw the 01st appellant at close quarters in the police vehicle before the ID parade took place on the following day. She then clarified that she saw the side of the 01st appellant's face as the 02nd appellant had blocked her view. According to her before this encounter she had already explained the faces of the appellants to the police.

[15] In re-examination PW1 had said that she came to the police station on 28 June 2014 for the police to take her to the crime scene and then saw the side of the face of the 01st appellant not clearly in the police vehicle. There is a reference in re-examination of the defense counsel about her seeing him at the police vehicle on 30 June 2014. However, neither such a question nor her answer had been recorded earlier.

Evidence against the 02nd appellant (01st accused)

[16] The complainant had stated that following the 04th appellant the 02nd appellant came, split her legs and forcefully inserted his penis into her vagina. The 04th appellant had helped him splitting her legs. The 02nd appellant had forced his tongue into her mouth. He too had put love bites on her neck. She had struggled, twisted her body to prevent him from inserting his penis and scrammed. The 02nd appellant had even punched her about 06 times and the others were laughing and swearing at her uttering filth in iTaukei.

[17] She had observed him with no obstruction during the period of about 30 minutes where he was having sexual intercourse in the lights which were 'bright'. His face was about 05 inches away. According to her, she was good at identifying people's faces. She had seen the 01st appellant before on 31 December 2013 at Suva Street party at the Ritz Nightclub mopping the toilet floor. Thus, she in fact had recognized him on the day of the incident where he had a piercing ring on his nose. PW1 had identified the 02nd appellant at an ID parade at Totoga police station 03 days after the incident. She had also pointed at him in the dock at the trial.

[18] Under cross-examination the complainant had stated that she came for the police ID parade on 01 July 2014 and on 28 June 2014 she saw the 02nd appellant at the Central Police Station and she could recognize him as she had seen him earlier. At the ID parade no one was wearing a nose ring and she had already identified the 02nd appellant by the time she was asked to look at his nostrils. She admitted to be slightly drunk but not very drunk at the time of the incident. The blue and green lights at the Karoke Bar ware flashing and dim but not that dim and she was not dizzy at the time of the rape. She saw everything the 02nd appellant was doing. She had told the police that five unknown men raped her as she did not know the names but remembered their faces.

[19] In re-examination, the complainant had said that she saw the 02nd appellant in the police vehicle on 28 June 2014 when she came there to be taken to the crime scene

and she saw a ring on his nose that day. She had further said that she saw a ring on the 02nd appellant's nose at the ID parade.

Evidence against the 03rd appellant (03rd accused)

[20] The complainant has testified that the 03rd appellant also came on top of her and inserted his penis into the vagina which was inside her for about 10 minutes.

[21] His face was 07 inches away from her and the light was sufficient for her to identify him. According to the complainant, she had seen him before as he was her senior at Dudley High School from 2009-2011. When she screamed at him to stop raping saying *'stop'! We went to the same school! I know you'* he had stopped. All of them had started laughing at her and she kept on crying.

[22] PW1 had identified the 03rd appellant at a police ID parade at Totoga police station 03 days after the incident. She had also pointed at him in the dock at the trial.

[23] Under cross-examination the complainant having reiterated that the 03rd appellant was her senior at Dudley High School from 2009-2011 and she recognized him because of that had later stated that she was not sure whether he was a student at Dudley High School. She had also said that the 03rd appellant's sister and her sister had attended the same school in 2011 and having finished his school career the 03rd appellant came with his family for the prefect induction ceremony. Under further cross-examination she had agreed that the 03rd appellant never attended nor was her senior at Dudley High School but came for his sister's prefect induction ceremony as a guest. Upon being confronted with her statement to the police, PW1 had stated that she had not mentioned that the 03rd appellant was her senior because the police never asked her. However, she had reaffirmed that that she could remember his face from 2011 to the date of the incident and recognized him on the day of the incident after seeing his face clearly despite her pains. She had been adamant that she was not mistaken about his identity and 100% sure that it was the 03rd appellant whom she saw at that time. She had admitted that she saw the 03rd appellant in a police vehicle at the Central Police

Station. She had also stated that she did not see a golden tooth in the 03rd appellant as suggested by his counsel.

[24] Under re-examination, the complainant had stated that the 03rd appellant was not her senior at Dudley High School but reaffirmed that she was 100% sure that it was the 03rd appellant whom she saw at the Karoke Bar. She also had reiterated that she saw him at the police vehicle.

Evidence against the 04th appellant

[25] The complainant had said in evidence that as she came out of the toilet the 04th appellant punched her repeatedly on the face and back of her head and she blacked out for a brief time. Then he had lifted her on his shoulders and threw her on to the settee in the Karaoke Bar. He had continued to punch on her face, the side of her chest and banged her head on the wooden part of the settee. He had pulled down her pants and panties and come on top of her. She has struggled, screamed, tried to kick and begged of him to stop. However, due to the loud music nobody had heard her cries. He had parted her legs and put his 'big' penis into her vagina. He had sex with her for about 45 minutes.

[26] Altogether PW1 had seen the 04th appellant for about 02 hours and her vision had not been obstructed. There had been lights from the wall and the ceiling and his face was about 05 inches away though she had seen him for the first time.

[27] Under cross-examination the complainant (PW1) had said that the wash room was well lit where the 04th appellant had initiated the attack on her and the light in the Karaoke Bar was sufficient for her to see his face. She had said that she saw her father's face that night while screaming and struggling but that stateman had not been clarified by either party. It appears that her statement had been more figurative than real. It had been suggested that the 04th appellant had taken her to the Karaoke Bar because she was acting in a disorderly manner. It was also suggested that she was having sex with her friend Sala's (PW2) husband and it was Sala who punched her and for that she was blaming the 04th appellant. It was further suggested that the 04th

appellant had flashed water on her face in the following morning but she had said that she went home after the incident.

Salanieta Radaniva's* (*PW2) evidence

[28] According to PW2, Salanieta Radaniva she had followed the complainant to the washroom but had come out early. After a while she had not seen PW1 sitting where she was and when she realized that PW1 was not there she started looking for her and not finding her in the washroom or on the dance floor she had proceeded to the Karaoke Bar. She had seen PW1 lying on a settee with her eyes closed. PW2 thought that PW1 was o.k. and came back but went there again after a while. Then a bouncer identified as the **03rd appellant** standing at the door had prevented her from entering the Karaoke Bar. She had told him that she wanted to see her friend but the **03rd appellant** had kept telling her to go away. She had gone away but returned again later but found the door closed. She had looked through the glass door and with the dim but sufficiently bright light, seen the old man identified as the **04th appellant** punching PW1's head and pulling her hair about 05 footsteps away. Another bouncer wearing an earring on the nose identified as the **02nd appellant** was watching what was happening. She then started looking for her other friends to tell them what was happening to PW1 but could not see them. Then she again went to the Karaoke Bar and met the **03rd appellant** there. She had been punched by a bouncer inside the Karaoke Bar who said that he knew her mother and PW2 was his wife. PW2 had identified that person as the **04th appellant** and according to her he was trying to take off her top and putt down her pants and she tried to get out of the Karaoke Bar because of what was happening. She had seen the complainant inside the Karaoke Bar. The **04th appellant** had put her down on the floor, opened his trouser, took out his scrotum and put it inside her mouth. She had slapped it away and ran out. PW2 had stated that she could remember the **04th appellant** as he came to their table every now and then in the night and also because he was trying to rape her. She had seen **02nd appellant** playing music in the Karaoke Bar before the incident wearing an earring on the nose. She had seen PW1 lying unconscious and not properly dressed on the floor inside the Karaoke Bar at 6.00 a.m. and with another friend they had woken

her up. Thus, PW2 had not implicated the 01st appellant in the incident in her evidence.

[29] Under cross-examination PW 2 had stated that she saw the 01st appellant doing his job of picking glasses etc. during the whole time she was on the dance floor and she had not pointed at the 01st appellant at the ID parade either. According to PW2 she had not seen the 03rd appellant inside but outside the Karaoke Bar. She had seen the 03rd appellant being brought to the police station. She had claimed to be a regular customer at Ritz Nightclub and seen the 03rd appellant mostly at downstairs and sometimes on the dance floor. She had not been cross-examined on behalf of the 02nd and 04th appellants.

[30] In re-examination she had clarified that she saw the 03rd appellant at the police station handcuffed the day before the ID parade.

Sergeant 47 Napolioni Komaitai's evidence (PW3)

[31] Sergeant 47 Napolioni Komaitai (PW3) who had conducted the police ID parade had testified that for the ID parade conducted on 01 July 2014 nine persons called wheelbarrow boys were brought and lined up outside the CPS. Twelve rounds were conducted for 03 witnesses with the same 09 persons. He agreed that the 09 persons were not of the same height as the 02nd appellant who was identified by the complainant.

[32] According to him. The complainant had identified the 02nd appellant first and he was given the chance to change his position but he did not want to do so. Thereafter, PW2 had identified him.

[33] The 01st appellant had been brought next and the 09 persons were of the same ethnic origin but not of the same height as the 01st appellant because it was difficult to get people to match the characteristics of him. PW1 had identified the 01st appellant who was then given the option of changing his position. PW2 had been brought next and she had identified the 01st appellant.

[34] The 03rd appellant had been brought to the ID parade next and he had not objected to any persons in the line-up. Those 09 persons were not of the same height and built as the 03rd appellant. It was not easy to get people with the same characteristics as the 03rd appellant. The complainant had identified the 03rd appellant. He was then given the option of changing his position. Then, PW2 in her turn had identified the 03rd appellant.

[35] Under cross-examination, Sergeant 47 Napolioni had said that out of 09 persons no one had earrings on the nose. He had conducted the parade without the presence of an inspector. He had reiterated that it was not easy to get people with the same characteristics as the 01st, 02nd and 03rd appellants. In re-examination he had stated that inspectors were engaged in other duties and he was the next most senior officer.

Dr. Shelvin Kapoor's evidence (PW4)

[36] Dr. Shelvin Kapoor (PW4) had stated that no injury to the vagina of the complainant had been found and since PW1 was already sexually active even if there had been forced sexual intercourse it could not leave any signs. However, he had observed tenderness that could be the result of a punch or fall on a hard surface. Strong punches could have knocked her off.

[37] The 01st to 03rd appellants gave evidence at the trial and the 04th appellant remained silent.

02nd appellant's evidence

[38] The 02nd appellant had admitted having worked at Ritz Nightclub on the day in question. He had described the flash lights of different colors on the ceiling above the dance floor and tube lights in the Karaoke Bar. He had entered the Karaoke Bar three times from time to time. On 29 June 2014 he had been taken for reconstruction of the crime scene along with the 01st appellant. When they were in a police vehicle, some girls had come near the police vehicle and police officer Anare Raiwatale had given

them fares and told them that ID parade would be on the following day. The girls were those who had identified them at the ID parade and they had seen them. The 01st appellant had admitted to have been identified at the ID parade and stated that he wore stud earrings on both ears on 26 June 2014. He had denied the rape allegation.

[39] DW2, Jona Junior Bacau called by the 02nd appellant had stated that all four appellants were working at Ritz Nightclub on the day in question. The 02nd appellant had been the 'floor-man' and after 2.00 a.m. the 02nd appellant had gone to sleep in the DJ booth and the witness woke him up at 5.00 a.m. Under cross-examination he had agreed that one 06 feet tube light was hanging over the billiard table in the Karaoke Bar and flashing lights were pinned to the ceiling. If two people were close to each other, they could recognize each other.

01st appellant's evidence

[40] The 01st appellant had stated that he was working at the dance floor as a security guard at Ritz Nightclub on the day in question. The other appellants too were working there on that day. He had not seen any unusual incident. His account of a group of girls coming near the police vehicle where they were and the girls seeing him is similar to that of the 02nd appellant. According to him the police officer Anare Raiwatale had given the girls' fares. The same girls had come for the ID parade and except PW2 others including the complainant identified him. PW2 had told the police that he was working at the dance floor but not pointed at him. Under cross-examination the 01st appellant had stated that there was a lady whom the 04th appellant had identified as his wife standing with the 04th appellant crying at the door of the Karaoke Bar. The 01st appellant had told him that her name was Ema (the complainant).

03rd appellant's evidence

[41] The 03rd appellant had stated in evidence that he attended Ratu Sukuna Memorial School in 2005 and then went to Chevalier Training Center in 2007 and 2008. He had worked for a company in 2009. From 2010-1014 he was working at Ritz Nightclub.

He denied being the complainant's senior at Dudley High School from 2009-2011. Nor did he attend a prefect induction ceremony at the same school. However, he admitted that his sister attended Dudley High School and she was a prefect.

[42] He had also admitted that he was working as a doorman at Ritz Nightclub on the day of the incident at its entrance. He had gone to Karaoke Bar at 11.15 p.m. and the 02nd appellant also had been there. He had then gone to the dance floor to mix grog at 12.20 p.m. He had seen the 04th appellant pulling a girl whom the 04th appellant called his wife referred to as Ema (the complainant). Ema was drunk and unstable. He had then gone downstairs. He had seen the 04th appellant and his friends chasing Ema who was running towards a parked car and he and others had chased the 04th appellant and asked him not to interfere with the girl. He denied the rape allegation.

[43] According to the 03rd appellant on 26 June 2014 some police officers came to Ritz Nightclub with Ema and she pointed out the 04th appellant. He was with the 04th appellant at that time. On 30 June 2014, when he was in handcuffs at Totogo police station he was brought to the reception where Ema, PW2 and another (Akata) were and they saw him. On 01 July 2014 he attended the ID parade and did not object to the people in the lineup.

[44] Under cross-examination the 03rd appellant had admitted that the light was sufficient in the Karaoke Bar for him to identify the 02nd appellant and even see Ema's eyes. He however disagreed with the complainant Ema's version of events.

[45] The 03rd appellant's sister Litiana Kotoitamavua in her evidence had stated that she knew the complainant while at Dudley High School from 2008-2012. Ema also knew the witness and Ema had left school in 2011. She was a prefect from 2010-2011 and there was a prefect induction ceremony where she invited her aunt but the 03rd appellant was not there. Under cross-examination she agreed that she was close to the 03rd appellant and living with him in 2011 and if he asked her to do something she would do it which she qualified in re-examination by stating that she would do anything he asked for a good purpose.

Agreed facts

[46] The trial judge had referred to the agreed facts in the summing-up which firmly put the 01st to 03rd appellants at the crime scene on the day in question. In their evidence at the trial 01st to 03rd appellants had stated much the same:

> *'[25] Accused No. 1, 2, 3 and the State submitted three sets of "Agreed Facts", dated 3 July 2015. In each of the "Agreed Facts", Accused No. 1, 2, 3 and the State acknowledged the alleged victim (PW1) as the complainant in this case. Accused No. 1, 2 and 3 also admitted they were at the crime scene (i.e. Ritz Nightclub) at the material time, and they were working there as bouncers and doorman for the Nightclub. In the case of Accused No. 1, he admitted going into the Karaoke Bar three times on 26 June 2014. He admitted he had a stud earing on his nose at the time.'*

[47] Therefore, the central issue here is whether 01st to 03rd appellants were the people who had committed acts of rape on the complainant. In other words, the issue is whether the complainant's identification of them as the perpetrators was correct or mistaken, for all of them deny allegations of rape.

[48] The complainant was firm in her evidence that she had correctly identified 01st to 03rd appellants when they one after another raped her. She had no doubt that she was in a state of mind to do so and the lights in the Karaoke Bar were quite sufficient for her to identify the appellants. On the totality of the evidence, I have no reason to doubt the complainant's evidence in regard to her ability to identify people on the day in question in the surroundings she was raped. The evidence of the 01st to 03rd appellants does not cast a serious doubt on that aspect. In any event this aspect of the case had been addressed by the trial judge in the summing-up as follows:

> *'[40] An important issue in this trial was the condition of the lights in the Karaoke Bar. Accused No. 1 said there were 4 lights in the passage in the Karaoke Bar and one 4 feet tube light hanging over the billiard table. He said, the 4 lights in the passage were like diwali lights, going on and off. In cross-examination, Accused No. 1 said the 4 feet tube light over the billiard table shown on the table and its surroundings. The settee on which the alleged rape occurred was four footsteps away. Jona Junior*

Bacau (DW2), the Ritz Nightclub DJ said, the lights in the Karaoke Bar were dim, but when two people are close to each other, they could recognize each other. The complainant's face was 5 to 7 inches from the accused, when they were having sex with her. Accused No. 3 said, he went to the Karaoke Bar on 26 June 2014. He saw Accused No. 1 and one Wati in the same. He said, although the light was dim, he managed to identify Accused No. 1 and Wati. You will have to take the above on board when considering the strength of the lights in the Karaoke Bar at the material time.'

[49] The complainant's identification of the appellants consists of the initial identification at the crime scene, identification at the ID parade and dock identification. In respect of some appellants, she claimed to have seen them before the incident. As pointed out earlier the trial judge had given Turnbull directions in the summing-up regarding the initial identification at the crime scene.

Evidence relating to the 02nd appellant's identification.

[50] The trial judge at paragraph 35 of the summing-up had addressed the assessors on the complainant's identification of the 02nd appellant. This evidence consists of her having seen him before on 31 December 2013 at Suva Street party at the Ritz Nightclub mopping the toilet floor and on the day of the rape incident he was wearing a piercing ring on his nose. This, no doubt is strong evidence enhancing the credibility of the complainant's identification of the 02nd appellant as one of the perpetrators.

[51] According to PW2 the 02nd appellant was wearing an earring on the nose but only watching what was happening inside the Karaoke Bar. The 01st appellant testified at the trial that he wore visible stud earrings on both ears on 26 June 2014. The trial judge had however not placed this evidence before the assessors.

[52] Regarding the complainant having seen the 02nd appellant inside the police vehicle on 28 June 2014 the trial judge had only said that '*However, a possible weakness in the police identification parade was that the complainant saw Accused No.1 at the Totogo Police Station on 28 June 2014'.* The defense argues that this was totally inadequate.

[53] In **Nalave v State** [2019] FJSC 27; CAV0001.2019 (1 November 2019) the Supreme Court proceeded on the basis that there had been no identification parade attended by this witness and dealt with the effect of dock identification as follows:

> *'[36] The Court of Appeal addressed the dock identification issue. They said that it did not add anything to the case against Nalave. They correctly noted that the judge failed to point out any weaknesses in the identification testimony and that dock identification is "suggestive and highly prejudicial to the accused, "However," they added, "the discretion to allow dock identification lies with the trial judge after weighing its probative value over its prejudicial effect (Wainiqolo v State unreported Cr App No AAU0027 of 2006; 24 November 2006." The Court added:*
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> > *"In the present case, Mr Ulunikoro's[3] initial identification of the appellants was not a fleeting glance. He had an opportunity to observe both appellants on a number of occasions when they were in the club on the night of the alleged incident. He even had a conversation with the women when they arrived at the club. No objection was taken to the admissibility of dock identification of the appellants by their respective trial counsel. In any event, the prejudicial effect of the first time dock identification diminished when the learned trial judge told the assessors to attach little weight to the dock identification."*
>
> *[37] Whilst it is correct that a trial judge has a discretion to allow a dock identification, I endorse the suggestion by the editors of Archbold 2018 that "in practice the exercise of such a discretion should not even be considered unless the failure to hold an identification procedure was as a result of the defendant's default."[4] There was, as far as the evidence established, no identification parade and there was no suggestion that either petitioner had refused to attend one. Even had there been an identification parade at which the security guard had been asked if he could recognise anyone, it would have been a worthless exercise if it had taken place after the security guard had seen the accused persons in the custody of the police as suspects. In so far as it lay within the power of the trial judge to permit the dock identification – we do not know whether it merely emerged to his surprise – he ought not to have permitted it.'*

[54] In the case of the 02nd appellant, it was a not a first time dock identification. The complainant had seen him before and identified him at the ID parade. There was no objection at all to the dock identification. PW2 had seen him inside the Karaoke Bar watching the happenings. He was wearing an earring on the nose which he himself

substantially admitted along with his presence at Ritz Nightclub on the day in question. In the circumstances in my view, the discretion to allow dock identification by the trial judge had been correctly exercised and its probative value certainly outweighed its prejudicial effect, if any.

[55] One of the main issues is whether the identification at the ID parade was a worthless exercise because the complainant had admittedly seen the 02nd appellant inside the police vehicle on 28 June 2014. There was no suggestion that the police had pointed out the 02nd appellant to the complainant. Apparently, the police officer had called her near the police vehicle to give her fares and she happened to see him inside the vehicle. Did sighting the 02nd appellant inside the police vehicle make the complainant conclude that he should be one of the perpetrators or did it merely reinforce her conviction that he was one of the perpetrators?

[56] Whatever the answer to that question may be (which is only a matter of speculation at this stage), it appears to me that the trial judge's description of it only as '*a possible weakness in the police identification parade'* is inadequate to bring home the effect of it on the reliability of the complainant's identification of the 02nd appellant at the ID parade. The trial judge had also not directed the assessors as to what weight they were prepared to place on the identification of the 02nd appellant at the ID parade in the light of the complainant having seen him inside the police vehicle.

[57] In **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 where dock identification evidence has been led but the trial judge has not given even the Turnbull directions, the Supreme Court had discussed a complaint arising from the dock identification. The court said:

> *'[25] The dangers of a dock identification (by which it is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognises him, but because the witness knows from where the defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not*

*object to a dock identification , it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account". (*emphasis added)

[45] I return to the irregularities in the trial as a result of the dock identifications and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a "substantial miscarriage of justice" occurred? The Court of Appeal took the view that no prejudice had been caused to Naicker because the identification of him by Naqaruqara and Draunimasi were not as a result of a fleeting glimpse of him, but lasted in one case for about 15 minutes and in the other for about 20 minutes. The question, in my opinion, is whether the judge would have convicted Naicker of murder if there had been no dock identification of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge could have convicted Naicker without the dock identifications. The question now is whether he would have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the dock identifications, the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.'

[58] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal restated the test formulated in ***Naicker*** as follows:

*'[36] Thus, the Supreme Court appears to formulate a two tier test. **Firstly,** ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. **Secondly,** whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.'*

[59] Therefore, I am of the view that given the totality of evidence, the trial judge also should have asked the assessors that even excluding the identification at the ID parade they were inclined to accept the complainant's identification of the 02nd appellant as one of the rapists at the crime scene beyond reasonable doubt.

[60] In addition the trial judge does not seem to have addressed any weaknesses of the ID parade itself as identified in evidence such as the same 09 persons (some of whom wearing distinctive cloths to be identified as wheelbarrow boys) being lined up for all 12 rounds and them not being of similar characteristics to the 02nd appellant etc.

[61] Police ID parades should as far as possible be conducted according to the guidelines given in Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85. Considering that FSOs are not indispensable rules of law but procedural guidelines to ensure fairness, non-compliance or deviation thereof would not necessarily vitiate results of ID parades. However, the value, weight, reliability and credibility attached to identification made at such ID parades would be diminished depending on the degree of transgression. It is for the trial judges to direct the assessors or remind themselves of the possible adverse repercussions arising from such non-compliance or departure. However, I must stress that the police officers conducting ID parades should familiarize themselves of the relevant FSOs and adhere to those guidelines and unless strict compliance is not possible for reasons beyond their control, they should follow them as best as they could in the circumstances.

[62] Unfortunately, the trial judge had not addressed the assessors or himself on those lines in the summing-up and the judgment.

Evidence relating to the 01st appellant's identification

[63] The trial judge at paragraph 36 of the summing-up had addressed the assessors on the complainant's identification of the 01st appellant. In addition to the complainant's unequivocal evidence on the 01st appellant as one of the perpetrators at the crime

scene despite the fact that she had had not met him before, PW2 had not involved him in the rape incident as far as her evidence went and according to her she saw the 01st appellant doing his job of picking glasses etc. during the whole time she was on the dance floor and she had not pointed at the 01st appellant at the ID parade either although PW3 had said in his evidence that she identified the 01st appellant. The 01st appellant in his evidence had said that PW2 did not identify him at the ID parade.

[64] Thus, barring the complainant's identification at the ID parade it was a case of first time dock identification. What I discussed in this regard under the 02nd appellant is equally or even more applicable to the 01st appellant. The trial judge should have directed the assessors on the adverse effects on the identification of the 01st appellant by the complainant at the ID parade after seeing him inside the police vehicle and the seemingly favorable evidence of PW2 *vis-à-vis* the 01st appellant. The trial judge should have asked the assessors what weight they would give to the complainant's identification of the 01st appellant at the ID parade and whether they were prepared to act on the complainant's testimony on identification at the crime scene alone in bringing home the charge of rape against the 01st appellant even if they exclude evidence of identification at the ID parade.

[65] The same issues relevant to the ID parade itself discussed above are also applicable to the 01st appellant's case which the trial judge had failed to bring to the notice of the assessors.

Evidence relating to the 03rd appellant's identification

[66] The trial judge at paragraph 37 of the summing-up had addressed the assessors on the complainant's identification by the 02nd appellant as one of the rapists at the crime scene. According to her she was 100% sure that she identified him. The other evidence includes her having seen him previously at his sister's prefect ceremony at Dudley High School between 2009 and 2011 and his stopping the act of rape when she said that she knew him as both went to the same school. However, she later admitted that the 03rd appellant had not attended Dudley High School but stood by her evidence regarding prefect day sighting. Nevertheless, the 03rd appellant and his sister

had testified that he not only did not attend Dudley High School but was not present even at the prefect induction day ceremony. The trial judge had not brought this evidence to the attention of the assessors. The other evidence is that the 03rd appellant had prevented PW2 from entering the Karaoke Bar from outside when she said that she wanted to see Ema (PW1).

[67] The only thing the trial judge had said of the complainant having seen the 03rd appellant in the police vehicle at the CPS was that it was a possible weakness in the police identification parade which as I have already pointed out is inadequate. PW2 had seen the 03rd appellant being brought to the police station before the ID parade or as she said under cross-examination she saw him in handcuffs at the police station. According to the 03rd appellant he was in handcuffs at Totogo police station when the complainant and PW2 saw him prior to the ID parade. He was with the 04th appellant when the complainant had pointed at the 04th appellant to the police at the Ritz Nightclub. It looks as if the complainant had not pointed at the 03rd appellant on that occasion. The question is whether she identified him at the ID parade only after seeing him in the police vehicle. The trial judge had not addressed the assessors of these matters in relation to the weight to be attached to the identification results at the ID parade and whether they were going to still accept the rest of evidence as sufficient to establish the 03rd appellant's identity beyond reasonable doubt excluding identification at the ID parade.

[68] Similarly, the trial judge had not pointed out other deficiencies in the manner in which the ID parade had been conducted as I have already discussed before.

Evidence relating to the 04th appellant's identification

[69] It is clear from the evidence of the complaint that she had enough time to identify him at the crime scene. He had initiated the attack on her when she was coming out of the toilet. It had been suggested by the 04th appellant's counsel to the complainant that he had taken her to the Karaoke Bar because she was acting in a disorderly manner. PW2 had identified him as the old man indicating that he was visibly older to the rest of the appellants. PW2 had seen the 04th appellant punching PW1's head and pulling her

hair about 05 footsteps away and later he tried to take off her top and putt down her pants. He in fact had put her down on the floor, opened his trouser, took out his scrotum and put it inside her mouth. She had slapped it away and ran out. PW2 could remember the 04th appellant as he came to their table every now and then in the night and for what he did to her.

[70] The 01st appellant's unchallenged evidence was that the complainant, whom the 04th appellant had identified as his wife, was standing with the 04th appellant crying at the door of the Karaoke Bar. The 03rd appellant had said in his evidence that he saw the 04th appellant pulling the complainant whom the 04th appellant called his wife and him chasing her who was running towards a parked car and the 03rd appellant and others had chased the 04th appellant and asked him not to interfere with the girl. According to him, the complainant had identified the 04th appellant and pointed him to the police party at Ritz Nightclub when both of them were smoking a cigarette. The evidence of the 01st and 03rd appellant's on these matters had stood unopposed by the 04th appellant who remained silent at the trial.

[71] In the circumstances, why the 04th appellant was not produced at the ID parade could be understood. Given the complainant's prompt and previous identification of the 04th appellant at the Ritz Nightclub in the evening on 26 June 2014, the dock identification at the trial was correctly permitted as it was not a first time dock identification. The probative value of the complainant's dock identification of the 04th appellant far outweighed its prejudicial effect, if any. Thus, the dock identification was not obnoxious to the principles in **Nalave v State** (supra). In any event his counsel had not objected to the dock identification. Further, applying the tests formulated in **Naicker v State** (supra) and **Korodrau v State** even excluding the dock identification there was overwhelming evidence establishing the 04th appellant involvement with the crime beyond reasonable doubt. Such evidence was both sufficient and credible. His own suggestion shows that he had taken the complainant inside the Karaoke Bar. Any reasonable assessors and a trial judge would have without doubt found him guilty of the charge of rape on the totality of evidence available. Thus, there is no merits in the 04th appellant's only ground of appeal where leave to appeal was granted at the leave stage.

Summing-up

[72] I find that the summing-up lacks a thorough discussion of all relevant evidentiary matters coming both from the prosecution and the defence as was required in this case. The summing-up has not devoted sufficient space for the possible deficiencies in the complainant's evidence in prosecution case and evidence favourable to the defence. Similarly, the summing-up lacks a full discussion of the prosecution evidence either. Most importantly, the learned trial judge has not shared with the assessors all relevant evidence including possible strengths and weaknesses on the crucial issue of identification. Nor had the judge discussed them in the judgment.

[73] In **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) the Court of Appeal summarised some of the essential characteristics in a summing-up as follows:

> *'[52] Assessed against the judicial pronouncements, the summing up, in my view, is devoid or suffers from the lack of following essential characteristics:*
>
> *(i) The summing up not tailored to the facts and circumstances of the case.*
> *(ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.*
> *(iii) Little weight given to the strong points for the defence and a fair picture of the defence not given to assessors.*
> *(iv) The contentious issues put in a way favourable to the prosecution and unfavourable to the Appellant.*
> *(v) The Judge at times appears to have usurped the fact finding function of the assessors.*
> *(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.'*

[74] As remarked in **Tamaibeka v State** [1999] FJCA 1; AAU0015 of 1997S (08 January 1999), it is my view that, unfortunately, in the present case the summing up lacks of some of the essential qualities of objectivity, even-handedness and balance required to ensure a fair trial. As a result, the summing up as a whole may have possibly led to a miscarriage of justice. This is also not a fit case for the exercise of the proviso to section 23(1) of the Court of Appeal Rules.

[75] However, all what I had discussed under the topic of identification of the 01st to 03rd appellants should not be taken to mean that the complainant was not creditworthy. In fact this court has to proceed on the basis that the evidence of the complainant was assessed by the assessors and the trial judge to be credible and reliable. This court is mindful of the benefit the assessors and the trial judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992):

> *'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……'*

[76] Nevertheless, I have brought out some of the matters and aspects that the trial judge should have reasonably pointed out to the assessors and upon which he should have advised himself before a verdict of guilty was recorded.

[77] Therefore, the next question this court has to consider is whether the verdict of guilty is unreasonable or cannot be supported having regard to the evidence or there has been a substantial miscarriage of justice in terms of section 23 (1) of the Court of Appeal Act. In doing so, I would also consider some recent decisions from Australia as it is more appropriate to seek guidance from Australian cases than from English cases in so far as section 23 is concerned as stated in **Tuimereke v State** [1998] FJCA 30; AAU0011u.97s (14 August 1998).

Is the verdict unreasonable or cannot be supported having regard to the evidence?

[78] In **Pell v The Queen** [2020] HCA 12 (07 April 2020) the High Court of Australia while acknowledging the advantage in seeing and hearing the witnesses by the jury remarked in reference to section 276(1)(a) of the Criminal Procedure Act 2009 (Vic) which is similar to the first and second limb of section 23 (1) of the Court of Appeal Act (Fiji), as follows:

'38….The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury…..'

'39. The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. ***The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.'*** *(emphasis added)*'

[79] Section 276 of Criminal Procedure Act 2009 (Vic) states as follows:

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

[80] The High Court in ***Pell*** in the course of the judgment approved the reference to **M v The Queen** (1994) 181 CLR 487 at 493 and **Libke v The Queen** (2007) 230 CLR 559 at 596-587[113] by the Court of Appeal on the approach to be taken in appeal on 'unreasonableness ground' as follows:

'43. At the commencement of their reasons the Court of Appeal majority correctly noted that the approach that an appellate court must take when addressing "the unreasonableness ground" was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in M. The

court must ask itself: ***"whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".***

44. The Court of Appeal majority went on to note that in Libke v The Queen, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the M test in these terms: ***"But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a doubt about the appellant's guilt."*** *(footnote omitted; emphasis in original)*

45. As their Honours observed, to say that a jury "must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. Libke did not depart from M.' (emphasis added)'

[81] In Fiji the Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) stated as to what approach the appellate court should take when it considers whether the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..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…. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.'*

[82] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him.

[83] Recently, the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) made the following remarks on the test to be applied by the appellate court regarding grounds of appeal based on verdicts that are supposedly '*unreasonable or cannot be supported having regard to the evidence':*

'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.

*[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

04th appellant's' appeal

[84] Having examined the record and in applying the above test, I would conclude that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt of the 04th appellant beyond reasonable doubt. I cannot say the assessors and the trial judge must have entertained a reasonable doubt about the 04th appellant's guilt or it was 'not reasonably open' to the jury to be satisfied beyond reasonable doubt of the commission of the offence by the 04th appellant. Consequently, I hold that the verdict of guilty in so far as the 04th appellant is concerned cannot be set aside on the basis that it is unreasonable or cannot be

supported having regard to the evidence. As a result pursuant to section 23(1) of the Court of Appeal Act the 04th appellant's appeal should be dismissed.

01st to 03rd appellants' appeal

[85] I cannot affirmatively arrive at a similar conclusion with regard to the 01st to 03rd appellants and cannot say that it was *not open* to the assessors and the trial judge to *acquit* (that is, the appellants' conviction was inevitable) which I shall discuss below.

Is there a substantial miscarriage of justice?

[86] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) the Court of Appeal examined the limb of 'miscarriage of justice' in section 23(1) and 'substantial miscarriage of justice' under the proviso to section 23(1) of the Court of Appeal Act:

> *'[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that 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. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
>
> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R –v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R –v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay –v- R** (1981) 27 FLR 202. In **Pillay –v- R** (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R –v- Weir** [1955] NZLR 711 at page 713:*
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> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. 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."*

[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

> *"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[87] Considering the deficiencies some of which were highlighted above in the summing-up, I cannot come to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted the 01st to 03rd appellants.

[88] Guidance could usefully be obtained from the decisions of High Court of Australia and the Supreme Court (Court of Appeal) in Victoria in the application of the provisions in section 23(1) (a) read with the proviso of the Court of Appeal Act in Fiji. However, it should always be kept in mind that in Fiji, unlike the jury, the assessors are not the ultimate fact finders. It is the trial judge who is the ultimate authority on facts and law and for determining guilt and innocence. The assessors [removed by Criminal Procedure (Amendment) Act 2021/Act No.02 of 2021] assist the trial judge and only express a non-bonding opinion. Subject to the above caution, several propositions of law on the scope of section 276(1) (a), (b) and (c) of Criminal Procedure Act 2009 (Vic) by the High Court of Australia and the Supreme Court (Court of Appeal) in Victoria are helpful in the application of the provisions in section 23(1) (a) read with the proviso of the Court of Appeal Act in Fiji.

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

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

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

[91] **Baini v R** (supra) at [33] set down the test of inevitability of the conviction in the following words to identify any 'substantial miscarriage of justice':

> *'….Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.'*

[92] In the two categories under section 276(1) (b) and (c) of Criminal Procedure Act 2009 (Vic), the court may find a substantial miscarriage of justice even if it was *open* to the assessors and the trial judge to *convict* unless the court finds that it was *not open* to the jury to *acquit* (that is, the accused's conviction was inevitable) which may lead the court to conclude that there was not a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59).

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

on the outcome of the trial (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Libke v R** (2007) 230 CLR 559; [2007] HCA 30 per Kirby and Callinan JJ). I think the 01st to 03rd appellant's appeals fall into this category.

[94] While holding that it was still open to the assessors and the trial judge to convict the 01st to 03rd appellants, I cannot say from my review of the record particularly given the errors in the nature of non-directions and omissions discussed above that the conviction of the 01st to 03rd appellants was inevitable, in the sense that it was not open to the assessors or the judge to acquit them and therefore, I cannot conclude that there may not have been a substantial miscarriage of justice (see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157).

[95] A conviction will only be inevitable where the appellate court is satisfied that, if there had been no error, there is no possibility that the jury, acting reasonably on the evidence properly admitting and applying the correct onus and standard of proof, might have entertained a doubt as to the accused's guilt. This recognises that section 276(1) of Criminal Procedure Act 2009 (Vic) only requires the appellant to show that if there had not been an error, the jury might have had a doubt about his or her guilt (**Andelman v R** (2013) 38 VR 659; [2013] VSCA 25). The focus is not on whether the court is itself satisfied that the accused's guilt is established beyond reasonable doubt (**Andelman v R** (2013) 38 VR 659; [2013] VSCA 25; **Baini v R** (2013) 42 VR 608; [2013] VSCA 157).

[96] In the light of my finding that given the errors the conviction cannot be held to be inevitable, and a substantial miscarriage of justice had occurred the appeals against conviction of the 01st to 03rd appellant should be allowed and their verdicts of guilty should be set aside.

[97] In view of my finding in respect of the 01st to 03rd appellants it is futile to consider their grounds of appeal individually, for I have addressed all of them in the course of this judgment collectively. I may only add that the trial judge's statement that '... *prime facie case had been found against the appellant…'* in the summing-up, though not capable of vitiating a conviction by itself in appeal, was unwarranted and should

be avoided by trial judges lest it might wrongly influence the assessors to think that the judge's view is sufficient indication that evidence is strong enough for a conviction.

[98] The only remaining issue is whether to order a new trial or enter a verdict of acquittal. In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

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

[99] Section 23(2) (a) of the Court of Appeal Act, Cap. 12 provides as follows:

> *"Subject to the provision of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."*

[100] In **Togava v State** (Majority Judgment) [1990] FJCA 6; AAU0006u.90s (10 October 1990) the Court of Appeal held that:

> *'We are of the opinion that instead of directing a verdict of acquittal to be entered in favour of the Appellants the interests of justice require that a retrial be ordered in this case. We say so having regard to the totality of the evidence presented before the High Court. We are unable to say what view the assessors might have taken in respect of each Appellant had they (the assessors) been properly directed on all relevant matters. ……'*

> *As we propose to order a retrial we have, in fairness to the Appellants, deliberately refrained from referring to pieces of evidence which could be regarded as strongly supportive of the prosecution case. We have however in exercising our discretion to order a new trial considered and balanced a number of factors some of which were for and some against the Appellants.'*

[101] Acting under section 23(2)(a) of the Court of Appeal Act and guided by the above decisions, I think the interests of justice requires that a new trial be ordered against the 01st to 03rd appellants in this case. This is reinforced by the finding that it was still open to the assessors and the trial judge to convict the 01st to 03rd appellants on the evidence available. At the same time it cannot be said that it was *not open* to the assessors and the trial judge to *acquit* either (that is, the appellants' conviction was inevitable).

Bandara, JA

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

Perera, JA

[103] I have read in draft the comprehensive judgement of Prematilaka, JA. I agree with it in its entirety.

Orders

1. 04th appellant's application to abandon the sentence appeal allowed.
2. 04th appellant's appeal against conviction dismissed.
3. 01st, 02nd and 03rd appellants' appeal against convictions allowed.
4. 01st, 02nd and 03rd appellants' convictions quashed.
5. A new trial ordered against 01st, 02nd and 03rd appellants.
6. 01st, 02nd and 03rd appellants to revert to remand custody subject to further orders of the High Court.
7. 01st, 02nd and 03rd appellants to be produced before the High Court within 30 days of the date of this judgement or as soon as it is practicable given the existing COVID-19 related restrictions on movement of persons.

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL