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

CRIMINAL APPEAL NO.AAU 0125 of 2015
[In the High Court at Suva Case No. HAC 221 of 2014]

BETWEEN	**:**	**FABIANO DAKAI NADUVA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**05 May 2021**
Date of Judgment	**:**	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Suva with one count of rape of 04 years old girl with his fingers contrary to section 207 (1) and (2)(b) and (3) of the Crimes Act, 2009 committed at Lami in the Central Division on 13 May 2014.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the opinion of the assessors in his judgment, convicted the appellant as charged and sentenced him to imprisonment of 12 years and 11 months with a non-parole period of 11 years.

[3] The appellant's appeal against conviction and sentence had been timely. However, the appellant had subsequently made an application to abandon the sentence appeal. The following ground of appeal had been canvased against conviction by the Legal Aid Commission unsuccessfully at the leave to appeal stage with the single learned Judge refusing leave on 23 October 2018:

> *"That the learned trial Judge erred in law and in fact in failing to consider that the complainant's evidence is unreliable in that:*
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> *i. There is a material discrepancy of what was reported to her mother as opposed to her mother's evidence of what the complainant reported.*
>
> *ii. The medical evidence contradicts the complainant's evidence that the appellant touched and pinched her vagina.*
>
> *iii. The complainant admitted in cross examination that her mother told her to say that the appellant touched her pussy which goes to support the appellant's case that the complainant's mother made up the allegation against him."*

[4] The Legal Aid Commission has since renewed the same ground of appeal against conviction for leave to appeal before the full court with an added expression *'Therefore the conviction cannot be supported having regard to the totality of the evidence, resulting in a substantial miscarriage of justice.'* and filed written submissions. The state too had filed written submissions for the full court hearing. The appellant's application to abandon the sentence appeal was not urged before the full court by his learned counsel, nor did he pursue the sentence appeal at the hearing of the appeal.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007

(19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Facts in brief

[6] Briefly, the circumstances that resulted in the conviction of the appellant were an allegation of digital rape of a 4 year old child. She had been the appellant's sister's daughter, in other words, the appellant's niece. On the day in question in the sitting room, the appellant had called out to the complainant who came to him. He had touched and pinched inside her pussy indicating that he inserted his fingers into her vagina. When she had said that it was painful, the appellant had told her *"never mind*." The victim's mother had been sleeping and the victim had gone to her mother and told her what had happened. On 26 May 2014, after 13 days the mother reported the matter to the police. Her explanation for the delay was that she was shocked, lost and discussed with the victim's father and even went for counselling before reporting the matter to the police against his own brother.

[7] The appellant's defense at the trial was a denial and that the act complained never occurred and that the complainant's mother had told the complainant to make up the complaint on account of an argument the mother had with the appellant earlier in the day. One of their sisters had testified to an argument between the appellant and the victim's mother on the day in question.

01st ground of appeal

[8] The learned counsel for the appellant has challenged the reliability of the child victim on three aspects of the prosecution evidence. The first of them is that the victim had told in her evidence that she told her mother that the appellant had touched her pussy whereas the mother in her evidence had said that she was woken by the victim who said that she had changed and mucus from the appellant's balls had gone on her clothing. The learned counsel therefore argues that the victim does not appear to have relayed to her mother that the appellant had touched her vagina on the same day as the

incident happened. The mother had also stated that a few days later *i.e.* on 26 May 2014 the victim had opened up and informed that the appellant had touched her private part whereupon it was reported to the police.

[9] However, it appears clearly from the victim's evidence that she had told in evidence that Momo (meaning uncle) Fabi (the appellant) had touched her pussy inside and pinched inside. According to her, she had told the mother soon after the incident that Momo Fabi had touched her pussy. From the mother's evidence it appears that the victim had first told her that she had changed and mucus from the appellant's balls had gone on her clothing and the mother had asked her to go and have a shower. The victim had confirmed that she had indeed changed her cloths after Momo Fabi had touched her pussy as there was mucus on her shorts. The prosecutor's attempt to take out from her as to where exactly mucus came from in re-examination was not allowed by the learned trial judge. It appears that something more than the appellant having touched inside the victim's vagina had happened where some 'liquid' had come out of the appellant's 'balls' on to the victim's shorts. This might be a reference to semen coming out of the appellant's penis but the prosecutor had not questioned the victim on this aspect in detail.

[10] Thus, what the victim had told the mother clearly had a factual basis. The mother had taken the victim on a bus ride to the town on the same day of the incident and when further questioned as to what happened the victim had told her that Momo Fabi touched her pussy which was still a recent complaint. Thus, though the victim had not told the appellant having touched her pussy to the mother at home she had disclosed it to her later in the day. The difference in the locality of disclosure does not take anything away from the fact of disclosure.

[11] Therefore, I do not agree that there was no recent complaint made by the victim to the mother as the complaint need not disclose all of the ingredients of the offence or describe the full extent of the unlawful sexual conduct as long as it discloses evidence of material and relevant unlawful sexual conduct on the part of the accused provided it is capable of supporting the credibility of the complainant's evidence. Both the victim and her mother had testified as to the terms of the complaint. This goes to the

consistency of the conduct of the victim with her evidence given at the trial and supports and enhances her credibility - See **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[12] The Court of Appeal usefully analysed the issue of memory and recollection of events by child and adult victims of sexual abuse cases in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018) which are applicable to the facts and circumstances of this appeal as well:

> *'[35] In **R v Powell** [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.*
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> *[36] It had been remarked regarding an adult victim of rape in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280) that:*
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> > *''(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) The powers of observation differ from person to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"*
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> *[37] The Supreme Court in **Lulu v State** Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version 'Their evidence is not a video recording of events.' In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details.*
>
> *[38] In **R v. B** [2011] Crim.L.R.233, CA it was held that the age of a witness is not determinative of his ability to give truthful and accurate evidence, and, if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age.'*

[13] The learned trial judge had placed all the evidence including the discrepancy highlighted by the appellant before the assessors and addressed in the judgment on contested aspects of the case. Significantly, the victim had physically demonstrated to the assessors and the learned trial judge both in examination-in-chief and in re-examination how the appellant did what he was alleged to have done to her. Both the assessors and the learned trial judge had believed the victim's evidence and that of her mother and rejected the appellant's defence.

[14] Accordingly, there is no reasonable prospect of success or merits in this complaint.

[15] The appellant's learned counsel has also argued that the medical evidence contradicts the victim's evidence that the appellant had touched and pinched inside her vagina.

[16] The doctor had stated that the victim's vaginal examination on 27 May 2014 (*i.e.* 14 days after the alleged incident) revealed that her hymen was intact and that there were no injuries in the hymen. There had been an abrasion on the left side between the vaginal opening and the labia minora. However, it was a superficial scrape of the skin. The doctor had said that the cause could be rubbing or scratching. She had also said that it was a mild abrasion and it would take 3-4 days or maximum 6-7 days to heal.

[17] According to medical opinion, in a situation where something is inserted inside the vagina there would be an injury to hymen. If a finger is inserted into a 4 year old girl's vagina it is highly expected the hymen not to be intact, the doctor had explained and she had further stated that that this kind of abrasion can be caused by wearing tight clothes like pants but not by wearing tight panty.

[18] In re-examination the doctor had stated that the victim's hymen was intact and nothing had gone through the hymen. Answering the learned state counsel she had said that if something went through the vaginal opening there would have been hymental lacerations, but in this case hymen was intact. A hymental laceration would heal within 2 weeks but old healed hymental laceration would be shown. She had stated that in this case she did not see any fresh or old healed hymental lacerations.

[19] Therefore, it appears that abrasion found on the left side between the vaginal opening and the labia minora of the victim which was a superficial scrape of the skin cannot be traced back to the date of the incident, for it could not have been visible after 14 days of the incident as per medical opinion. The learned trial judge had correctly stated this conclusion in the judgment.

[20] Therefore, the victim's evidence on digital penetration is not inconsistent with or contradicted by the medical findings. Only the physical evidence of old healed hymental laceration could have been seen after 14 days. However, for penetration to take place the appellant's finger need not necessarily have gone through the vaginal opening causing a hymental laceration. At no stage had the doctor ruled out penetration due to lack of old healed hymental laceration. Therefore, at best the medical evidence is neither supportive nor contradictory of an act of penetration or lack of it.

[21] Thus, the case against the appellant depends primarily on the victim's testimony and recent complaint evidence of the mother. The victim was insistent throughout her evidence that the appellant had pinched her pussy. Her answer that Momo Fabi did not do anything to her was in response to a leading question by the learned defence counsel that Momo Fabi did not do anything to her. However, when it was suggested that the appellant had not pinched her pussy she had answered that *'He pinched it'*. She had even demonstrated in open court as to how the appellant had done it.

[22] The Court of Appeal dealt with a situation where there was a doubt whether the penetration complained of by the victim was of vagina or vulva, in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) where it was stated:

> *'[13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with*

hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape.'

[23] It appears that helpful and explanatory remarks in ***Volau*** could equally apply to the evidence of the complainant in this appeal as well. It does not surprise me if the touching inside the victim's pussy or pinching inside of it by the appellant had gone only so far or deep as the vulva and therefore no injuries were caused in the vaginal area. Nevertheless, such touching and pinching inside her vulva, if not vagina is sufficient to constitute penetration (of any extent) under section 207(2)(b) of the Crimes Act 2009 as the information alleges.

[24] Though the information had mentioned only vaginal penetration it would not be a bar for a conviction for rape had the penetration of vulva occurred. From the evidence of the victim it is clear that if not penetration of vagina, the appellant had penetrated at least her vulva as she had felt pain. Medical distinction between vulva and vagina is

immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[25] It could also be that a slight vaginal or vulva penetration did in fact take place without, however, causing visible injuries in the vagina or vulva. Had the injury been a minor laceration or mild aberration it would have healed even without leaving scars after 07 days.

[26] Therefore, as already pointed out earlier medical evidence led by the prosecution in this case neither supports not contradicts the victim's evidence on penetration. There is no reasonable prospect of success or merits in this complaint.

[27] The third aspect of the appellant's ground of appeal relates to the victim's evidence under cross-examination that on a particular date before coming to court her mother told her to say that the appellant had touched her pussy. The appellant argues that this evidence demonstrates that the victim had been manipulated by her mother to complain against the appellant due to the acrimonious relationship between the two.

[28] However, considering the sequence of questions in cross-examination of the victim it is clear having given the above answer the victim had given an emphatic answer that the Momo Fabi had pinched her pussy.

[29] On the other hand, the victim had told the mother on the same day as the incident happened that the appellant touched her pussy. Even if the mother had asked her to say the very same occurrence in court she had only reminded the victim or refreshed her memory as to what she should say in court. There was no fabrication of anything new by the mother. Neither did the victim say at the trial that the mother told her to say anything that did not happen. Moreover, the victim had in fact demonstrated what the appellant did to her in court.

[30] The appellant's grievance under all three aspects of the ground of appeal appears to be coming under the categories of '*unreasonable or cannot be supported having regard*

to the evidence' though couched as constituting a '*miscarriage of justice'* in terms of section 23(1) (a) of the Court of Appeal Act which states as follows:

> *'**23**.-(1) The Court of Appeal*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:*
>
> *(b) ……..*
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> *Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.*
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> *(2) ……..*
>
> *(a) ……..*
>
> *(b) ……..*
>
> *(3) ……..*
>
> *(4) ……..*

[31] The learned trial judge had placed all three aspects of the ground of appeal before the assessors and he had addressed his mind to the same issues once again in his judgment including the victim's demeanour and deportment of the complainant and found that the case against the appellant had been proven beyond reasonable grounds. This court cannot be unmindful of the benefit the assessors and the learned 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……*

[32] Section 276 of Criminal Procedure Act 2009 (Victoria) 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—*
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> *(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.'*

[33] In drawing guidance from the decisions of High Court of Australia and the Supreme Court (Court of Appeal) in Victoria, it should always be kept in mind that in Fiji, unlike the jury, the assessors are not the ultimate fact finders. It is the learned trial judge who is the ultimate authority on facts and law and for determining guilt and innocence. The assessors assist the learned trial judge and only express a non-bonding opinion.

'***Substantial miscarriage of justice'***

[34] Subject to the above caution, the following 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 provision of the Court of Appeal Act in Fiji:

> *'1. Section 276(1)(a) 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 par (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]).*

2. *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.*

3. *In the latter two categories, the court may find a substantial miscarriage of justice even if it was* open *to the jury to* convict*. However, finding that it was* not open *to the jury to* acquit *(that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice (see* **Baini v R** *(2012) 246 CLR 469; [2012] HCA 59).*

4. *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).*

5. *In determining whether there is a substantial miscarriage of justice, the question is not whether the error may have had an effect on the jury. Instead, the court must consider the situation in the trial which would have existed if the error had not occurred. Where the court finds that the conviction was inevitable, in the sense that it was not open to a reasonable jury to acquit, then there may not be a substantial miscarriage of justice (see* ***Baini v R*** *(2013) 42 VR 608; [2013] VSCA 157).*

6. *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 s276(1) only requires the accused 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).*

7. *A misdirection of law may or may not amount to a miscarriage of justice. Whether it does so, depends on the context of the trial and the matters in issue. One example is where misdirection relates to a matter*

*which is not in dispute and which could not mislead the jury regarding any matter in issue (**Tunja v R** (2013) 41 VR 208; [2013] VSCA 174 per Maxwell P and Weinberg JA (Priest JA contra)).*

8. *A miscarriage of justice may also occur when the prosecutor mischaracterizes the accused's defence. If the judge then endorses that erroneous approach in his or her summing up, there may be an error or irregularity in or in relation to the trial (**Russell v R** [2013] VSCA 155).*

9. *The fact that the Crown may seek to rebut a claim of substantial miscarriage of justice by proving that the conviction was inevitable merely recognises that proof that a conviction was inevitable is relevant to determining whether there was a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59).*

10. *Departures from the proper processes of the trial may be so great that the court may find that there has been a substantial miscarriage of justice even if the accused's conviction was inevitable (see v **Baini v R** (2012) 246 CLR 469; [2012] HCA 59; **Andelman v R** (2013) 38 VR 659; [2013] VSCA 25).*

11. *In a case where it is in issue, the court must decide whether a conviction was inevitable based on the written record of the trial and, depending on the nature of the error, may consider the fact that the jury had returned a guilty verdict. This reflects the natural limits of the appellate task (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59; **Weiss v R** (2005) 224 CLR 300; [2005] HCA 81; **Baiada Poultry Pty Ltd v The Queen** (2012) 246 CLR 92; [2012] HCA 14).*

12. *Appellate courts often treat counsel's failure to take or press an objection at trial as evidence that, in the atmosphere of the trial, counsel did not see any error or injustice in the proposed course of action. Counsel for both the prosecution and defence should object to matters that prejudice the fair trial of the accused. Failure to do so creates a serious obstacle to raising the matter on an appeal (**R v Luhan** [2009] VSCA 30; **NJ v R** (2012) 36 VR 522; [2012] VSCA 256; **R v Momcilovic** (2010) 25 VR 436; [2010] VSCA 50; **MB v R** [2012] VSCA 248).*

13. *While the judge is responsible for directing the jury about the matters in issue and must give any direction necessary to avoid a substantial miscarriage of justice (Jury Directions Act 2013 ss13, 14, 15), an issue must be sufficiently raised by the evidence to warrant a direction to the jury. It is only necessary for judges to direct on the real issues, rather than remote or artificial possibilities (**Gavanas v R [**2013] VSCA 178; Tran v R [2007] VSCA 19).*

> *14. An appellate court will consider whether evidence which the accused does not rely upon sufficiently raises an alternate defence "so that a jury acting rationally might entertain a reasonable doubt as to whether the prosecution has established a necessary element of the charge" (**Gavanas v R** [2013] VSCA 178).'*

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

> *'....Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which 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.'*

'Unreasonable or cannot be supported having regard to the evidence'

[36] In assessing a ground of appeal based on 'unreasonable or cannot be supported having regard to the evidence', the Australian authorities have laid down the following principles. The test is that an appeal 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 [see **M v The Queen** (1994) 181 CLR 487, 493)].

[37] The test has also been expressed as requiring the appellate court to decide whether the jury must, as distinct from might, have had a doubt about the appellant's guilt (**Libke v R** (2007) 230 CLR 559, [113]. See also **Mejia v The Queen** [2016] VSCA 296, [140]; **Inia v The Queen** [2017] VSCA 49, [53]; **Conolly v The Queen** [2019] VSCA 125, [7]).

[38] This test of 'must have had a doubt' is another way of saying that the finding of guilt was not reasonably open. It does not depart from, substitute or gloss the earlier test from **M** (**Pell v The Queen** [2020] HCA 12, [45]; **Platt v The Queen** [2020] VSCA 130, [60]. See also **Conolly v The Queen** [2019] VSCA 125, [8]; **Tyrrell v The Queen** [2019] VSCA 52, [70]).

[39] In deciding whether it was open to the jury to convict, the court must take into account the fact that the jury is principally responsible for determining guilt and innocence. Setting aside a jury's verdict is a serious step. The appellate court must take account of the jury's advantage in having seen and heard the witnesses. The court must not "substitute trial by an appeal court for trial by jury" (**M v The Queen** (1994) 181 CLR 487, 493; R v Haseloff [1998] 4 VR 359; R v Baden-Clay (2016) 258 CLR 308, [65]-[66]). However, as the High Court explained in **M v The Queen:**

> *'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (M v The Queen (1994) 181 CLR 487, 494. See also Inia v The Queen [2017] VSCA 49, [53]).'*

[40] Further, the High Court in **Pell v The Queen** (supra) explained that:

> *'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.'*

[41] This process of assuming that the jury accepted a witness as credible and reliable and then examining the record to decide whether the jury ought to have had a reasonable doubt allows an appellate court to decide that, despite the assumption, the jury acting rationally ought not to have been satisfied of the witness' truthfulness and reliability (**Freeburn v The Queen** [2020] VSCA 155, [95]. See also **Pell v The Queen** [2020] HCA 12, [119]).

[42] 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 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.'*

[43] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is tested on the basis that it is unreasonable the test is whether the learned trial judge could have reasonably convicted on the evidence before him [see also **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[44] Recently, the Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test 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.'*

[45] The appellant's grievances do not refer to any error or irregularity or a serious departure from the proper processes of the trial. Therefore, his complaint of miscarriage of justice must be considered under *'unreasonable or cannot be supported having regard to the evidence'* in section 23(1)(a) of the Court of Appeal Act. Having examined the record, I would conclude that either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence, I cannot be satisfied that the assessors and the learned trial judge, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. Consequently, I hold that there is no miscarriage or substantial miscarriage of justice as the verdict is not 'unreasonable or cannot be supported having regard to the evidence' and as a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed. In conclusion, I would refuse leave to appeal on ground 01 and dismiss the appeal.

Bandara, JA

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

Rajasinghe, JA

[47] I agree with the reasons and conclusions in the draft judgment of Prematilaka, JA.

Orders

1. Leave to appeal against conviction is refused.
2. Appeal is dismissed.

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Hon. Mr. Justice C. Prematilaka
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 R.D.R.T. Rajasinghe
JUSTICE OF APPEAL