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

CRIMINAL APPEAL NO. AAU 0158 of 2016
[In the High Court at Lautoka Case No. HAC 120 of 2015]

BETWEEN	:	**JAMES ANTHONY NAIDU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	:	**Ms. A. Chand for the Appellant**
	:	**Ms. R. Uce for the Respondent**
Date of Hearing	:	**02 November 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant, aged 56, had been refused leave to appeal against his conviction and sentence by the single judge of this court in respect of the first count of rape by penetration of the complainant's mouth and the third count of digital rape of her vagina contrary to section 207(1) and (2)(b) of the Crimes Act, 2009 allegedly committed upon a 16 year old female on 01 May 2015 at Lautoka in the Western Division.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of the 01st and 03rd counts of rape but was not guilty of the 02nd count of rape alleged to have been committed by penetration of the victim's anus with his finger. The learned trial judge had concurred with the assessors, convicted

the appellant on the two counts of rape and sentenced him on 04 November 2016 to an aggregate sentence of 11 years and 11 months imprisonment with a non-parole period of 09 years.

[3] The appellant had renewed his appeal only against conviction on eight grounds of appeal not urged at the leave to appeal stage. At the hearing of the appeal counsel for the appellant abandoned the 08th ground of appeal. Thus, before the full court the appellant's counsel canvassed only the following grounds of appeal:

> *'Ground 1*
> *THAT the Learned Judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant to prove his innocence in the Judgment through his credibility.*
>
> *Ground 2*
> *THAT the Trial Judge failed to give a proper direction on the credibility and/or the*
> *inconsistencies of the Complainant surrounding her evidence.*
>
> *Ground 3*
> *THAT the Learned Judge erred in law when he failed to adequately consider the evidence*
> *elicited by both parties during the trial.*
>
> *Ground 4*
> *THAT the Learned Judge erred in law when misdirected the assessors on what weight is to be given to Meli Tauvoli's evidence and furthermore misdirected himself that Meli Tauvoli's evidence cannot be relied upon.*
>
> *Ground 5*
> *THAT the Learned Trial Judge erred in law and in fact when he failed to adequately address the issue of recent complaint.*
>
> *Ground 6*
> *THAT the Learned Trial Judge erred in law when he allowed the Prosecution to serve the*
> *statement of one of the crucial witness on the day of the trial, thus violating section 290 (1) of the Criminal Procedure Act and Section 14 (2) of the Constitution.*
>
> *Ground 7*
> *THAT the Trial Judge miscarried when the evidence of the complainant was re-taken in the absence of any reminder as to her cross-examination, any reminder of the evidence of appellant, or any warning as to misuse.'*

The factual matrix

[4] On 01 May 2015 at around 7pm the appellant had picked up the complainant ('HD') aged 16 - Form 5 student and her friend Sara from Ram Asre Road in his car. HD had known the appellant as a family friend. She had accompanied Sara since it was her school holidays and Sara was going to be employed at the JJ's Motel owned by the appellant who also ran a car rental business. HD had seen Meli Tauvoli a worker of the appellant inside the car. The appellant had driven the vehicle to the city and given Meli some money to buy liquor. Thereafter, all had gone to the seawall at Marine Drive. At the seawall all except the appellant had consumed liquor. After a while Sara and the appellant had gone somewhere in the appellant's car and upon their return Sara had informed HD that the appellant wanted to talk to her in private about her wages apparently on a prospective employment at the same workplace. According to the appellant he knew that HD was also on the lookout for an employment at JJ's Motel.

[5] Accordingly, HD had gone with the appellant in his car and she had sat on the front seat of the car. The appellant had driven the car to a vacant land at Navutu. After stopping the car, the appellant had locked the door of the car, pulled down his three quarter pants and told HD to suck his penis. HD, scared and shocked as she was, had nowhere to go or escape since the door was locked. The appellant had taken her head and pushed it towards his penis.

[6] While HD was sucking the penis of the appellant, he had pulled down her skirts and started to play around with her vagina and then inserted his finger into her vagina for about five minutes. At this time the appellant had received a phone call and he had pushed her head up.

[7] HD was wearing skirts and mini shorts that evening. After this, the appellant had driven HD back to Marine Drive. However, Meli and Sara were not there and the appellant had asked her to sit at the back. A little later, Meli and Sara were seen outside Hunters Inn and on their way to Hunters Inn the appellant had told HD not to tell anyone about what had happened and had thrown $20.00 at her.

[8] After picking Meli and Sara at Hunters Inn, the appellant had dropped HD and Sara home. The next day HD had met her best friend Janet Cathy and on her way to the church she had told Janet everything that happened to her the previous night.

[9] On 14 May 2015, Janet's mother Sereana Likusalusalu had told the complainant's sister Salome Dunn as to what had happened to the complainant. Salome had conveyed the same to her mother Alanieta Dunn and other family members. Upon returning from school, the complainant was asked if what the appellant had done to her was true. She had started crying and narrated her ordeal to Salome, her mother and the family. Upon hearing this Salome had asked the appellant to come home and he had obliged. According to Salome when the appellant was talking to their mother the police came and took him away. Apparently, Salome's husband had alerted the police about the presence of the appellant.

[10] According to HD's mother Alanieta Dunn, when the appellant came over he wanted to reconcile but she had told him that she trusted him and that she could believe that he would do such a thing to her daughter. The appellant's son and his workers had come to Alanieta's house on the following day to offer money but she had refused saying she could not take any money since the matter was in court and with the Police. After listening to the complainant, Alanieta had hugged and asked her why she didn't tell her story to her first. HD had answered that she felt ashamed to tell the mother of what happened.

[11] Janet Cathy had testified that HD told her that she had gone in the car with the appellant and after he stopped the car he asked her to suck his 'dick' meaning his private part and the appellant used his hands and fingers to touch her private part and gave her $30.00. Janet had noticed the complainant looking sad when she was telling her what had happened to her. Janet had told her mother Sereana what she heard from HD despite HD asking her to keep it as a secret.

[12] However, when Janet was recalled as a witness to verify two letters received by the trial judge's clerk from her the day after her testimony in court retracting her evidence, she had told court that after a few days of giving her police statement HD came to her house and asked her as to what she had told in her police statement.

During the conversation that took place HD had told Janet that everything she had told her about the allegation of sexual abuse was a lie. As a result of this evidence, HD too had been recalled as a witness by court and she had told court that she did not tell Janet that she had lied about her allegation against the appellant.

[13] Moreover, Janet had told court on her being recalled that she and her mother had gone to Lautoka police station and met W.D.C Irene Singh who recorded Janet's statement to the effect that HD's allegation was a lie. According to Janet this statement was read back to her and she was asked whether the contents were true and both Janet and W.D.C Irene signed it. However, considering Janet's evidence on this aspect to be crucial to a just decision of the case, the court had summoned W.D.C Irene to give evidence and according to W.D.C Irene, Janet and her mother had approached her about 03 or 04 times in order to withdraw Janet's previous statement but at no time had she recorded a further statement from Janet because no reason had been given for the withdrawal of the earlier statement and the case was already pending in court. Furthermore, it was only after the appellant was charged that Janet and her mother had started approaching W.D.C Irene with regard to the withdrawal of her original statement. Janet and her mother also had claimed to have seen Inspector Maciu who refused to record anything and informed Janet that she was not able to withdraw her statement. Janet's mother Sereana Likusalusalu had supported what Janet had said in court about meeting W.D.C Irene Singh and Inspector Maciu. However, the High Court judge had remarked in the judgment that there was no need for Janet and her mother to see Inspector Maciu if W.D.C Irene had in fact recorded Jenet's withdrawal statement.

[14] Saraseini Nawa referred throughout the trial as Sara had turned 'hostile' against the prosecution. Sara had stated that the second half of her first police statement dated 15 May 2015 (Defense Exhibit No.2) was not true since she was influenced and intimidated or manipulated by HD and her family to say whatever they wanted her to say. At the time she gave her police statement she was living with her younger sister at the house of HD but left the place one week after giving her first police statement. Sara had given another police statement on 08 April 2016 (Defence Exhibit No.3) seeking to withdraw her earlier police statement. Sara had also informed court that she was intimidated by police officer W.D.C Irene Singh that she would be a suspect

if she did not give her police statement. According to Sara, she had overheard HD and the entire family except her father talking about monetary gain from the appellant when they win the case.

[15] The learned High Court judge had rejected the evidence of Sara that she was influenced or intimidated by HD and her family to give her police statement on 15 May 2015 and remarked that after one week of giving that statement she had left the house of HD and started living with her grandfather at Veiseisei yet it had taken her about eleven months to go to the police station on 08 April 2016 to withdraw her statement. The trial judge had further observed that there is no mention in Sara's second police statement of 08 April 2016 that she had given her earlier statement under any influence or intimidation by HD or her family. In fact she had said in her evidence that when she gave her first statement on 15 May 2015 HD's family was not present at the police station. Moreover, contrary to what she told court in her evidence Sara had made no mention in the second police statement about any intimidation by W.D.C Irene. According to the judge, the second police statement of Sara had been recorded by A/Cpl 3692 Asenaca and there was no reason why Sara could not have mentioned about the intimidation of W.D.C Irene and the influence and intimidation by HD and her family to police officer Asenaca.

[16] The appellant in his evidence had denied the allegation and stated that he did not go anywhere from the seawall with HD alone and that the allegation against him was a fabrication. He had agreed that in the evening of 01 May 2015 he had picked Sara and HD with Meli. He was not aware that the complainant was going to accompany Sara. Sara had asked him to pick her up in the afternoon to talk about her employment in detail. He had agreed that he gave money for the purchase of liquor but he did not drink and it was Meli, Sara and HD who were drinking.

[17] The learned High Court judge had observed that the appellant had not challenged the evidence of Alanieta Dunn that his son and the workers approached her offering money. Although in the cross examination of HD it had been suggested that together with Sara she had asked for $200.00 from the appellant for clubbing that night and that they then asked for $800.00 for shopping as well, the appellant had not testified

to anything of that sort in his evidence. The complainant had rejected this suggestion with disdain.

[18] Although the appellant's defense had been that the rape allegation was an attempt to extort money from him by HD and her family, no evidence had surfaced at the trial that HD and/or her family had indeed made any approaches to the appellant for payment of money.

Ground 1

[19] The gist of the appellant's complaint is that by directions at paragraphs 128, 129 and 137 in the summing-up, the trial judge had shifted the burden of proof to the appellant to prove his innocence through his credibility. They are as follows:

> *'128. However, the accused decided to give evidence and also to call witnesses on his behalf. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.*
>
> *129. It is for you to decide whether you believe the evidence of the accused and his witnesses. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty of either or both counts.*
>
> *137. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.'*

[20] I do not see anything objectionable in asking the assessors to decide which witnesses were reliable and which were not, which witnesses were forthright and truthful and which were not and which witnesses were evasive or straightforward. It is was well within the assessors' prerogative to do so. However, the appellant's substantive criticism appears to be aimed at the phrase '*Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you'* as appearing from his argument that the assessors may have got the impression that they

had to weigh the credibility of the prosecution case against the defense case in order to decide the guilt or otherwise of the appellant instead of directing their mind whether prosecution on its own had proved its case beyond reasonable doubt.

[21] At the outset, it must be placed on record that the trial judge had addressed the assessors on the burden of proof and standard of proof correctly at paragraph 8 and 9 and informed them in no uncertain terms that the appellant had no burden to prove his innocence and the burden to prove his guilt beyond reasonable doubt remained with the prosecution at all times at paragraph 90 and 127. In addition, paragraphs 15, 16 and 26 make it clear that it is the prosecution's burden to prove all elements of the offending beyond reasonable doubt.

> *'8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.*
>
> *9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.*
>
> *26. If you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused has inserted his penis into the complainant's mouth without her consent then you must find the accused guilty of the first count of rape. Likewise if you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused has inserted his finger into the complainant's vagina without her consent then you must find the accused guilty for the second count of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the two offences of rape, then you must find the accused not guilty of either or both the offences.*
>
> *1. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times. He could have remained silent but he chose to give sworn evidence and be subjected to cross-examination.*

127. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call witnesses in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.'

[22] The appellant relies on **Liberato v The Queen** [1985] HCA 66; 159 CLR 507, **R v Li** (2003) 140 A Criminal R at 288 at 301 and **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) in support of his contention. Firstly, **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 were cases where the crucial issue revolved around the complainant's word against the appellant's word on the issue of consent. **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) also dealt with a similar scenario. In the appellant's case, his defense was an outright denial of the whole episode.

[23] In ***Gounder*** the Court of Appeal referred to ***Liberato*** and stated that a judge must always put defences raised by the evidence to the jury emphasising that the overriding duty of the judge is to put the defence fairly and adequately to the jury. In the course of the judgment the court remarked:

*'[44] Brennan and Deanne JJ in the Australian High Court case of **Liberato and Others v The Queen** [1985] HCA 66; (1985) 159 CLR 507 at 515 (minority) held, "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is common place for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. **The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue**." (emphasis added).*

[45] The Court of Criminal Appeal of the Supreme Court of New South Wales in R v Li (supra) following the minority decision in Liberato, quashed the convictions and ordered a new trial on the ground of mis-directions. Dunford J held, "The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth: They should have been directed:, the test was whether, taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence" (at 301). Hunt CJ in E (89 A Crim R 325) said, "A judge should not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused (Beserick (1993) 30 NSWLR 510 at 528; 66 A Crim R 419 at 435).

*'[46] In the instant case, the learned Judge in the summing up, explaining the onus and burden of proof states that, "If, after considering all the evidence, you are sure that the defendant is guilty you must return a verdict of "guilty". If you are not sure, your verdict must be, "not guilty". **However the learned Judge has erred by not explaining the defence case to the Assessors. The defence is that the sexual act was done with the consent of Emma. Emma says that it was done without her consent. Should not the Judge explain and give an analysis of the evidence to the Assessors?** (emphasis added)*

[24] Therefore, it is clear that what had persuaded the Court of Appeal in ***Gounder*** to set aside the conviction for rape was not necessarily the omission to tailor the directions on the exact lines proposed in ***Liberato*** but the overall lack of adequate directions on the defence of consent taken up by the accused in the light of the totality of evidence of the case. It does not appear that the Court of Appeal has made a prescription of the kind of direction to be given when the only issue is consent between the parties based on ***Liberato.*** In the end the court convicted the accused for defilement and sentenced him accordingly.

[25] ***Prasad*** too was a case where the main question to be decided was whether the learned trial judge had been accurate in his directions to the assessors as throughout the trial the accused had been steadfast that the charge of rape had been ill-conceived for the reason that the alleged indulgence in the act of sexual intercourse with the victim was consensual. The Court thought that given the totality of evidence particularly on the most crucial issue of consent a superficial direction to the effect

that *"if you are not fully satisfied, or not sure or in two minds to say that the complainant might have consented to have sex then that means you are in a doubt"* was insufficient.

[26] However, it appears that the Court of Appeal in ***Prasad*** recommended the following directions not necessarily for a 'word against word' situation on the issue of 'consent' but more as general guidelines.

> *'[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*
>
> *(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.*
>
> *(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.*
>
> *(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.*
>
> *(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.*
>
> *(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.*
>
> *(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.'*

[27] In fact, it is the experience of this court that some trial judges do give directions similar to the ones set out under paragraph [44] (iv), (v) and (vi) of ***Prasad*** particularly in cases where the defence adduces evidence, I think, more out of abundance of caution than as a mandatory rule but needless to say that not every case would demand such directions; nor lack of such exact directions would by itself vitiate a conviction, for there is no incantation to be chanted with a stereotype in every summing-up [see **Khan v State** [2014] FJSC 6; CAV009.2013 (17 April 2014].

[28] However, there is nothing wrong with such a direction and I would rather welcome it in appropriate situations. Similarly, the gist of ***Liberato*** guidelines *i.e. ". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt"* is given by trial judges in 'word against word' situations. Therefore, observations in both ***Gounder*** (which cited ***Liberato)*** and ***Prasad*** have to be understood in the factual contexts of those cases and on a perusal of the entirety of the two judgments it is not difficult to understand why the Court of Appeal arrived at the decisions it came to in the end.

[29] On the other hand ***Liberato*** has not uttered the final word on this issue. In **Johnson v Western Australia** (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in ***Liberato*** as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

[30] For that reason, it was usefully held in **Anderson** (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a ***Liberato*** *direction* be framed along the following lines **(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of

evidence that you do accept, proved the guilt of the accused beyond reasonable doubt? ***Prasad*** guidelines seem to be closely aligned with modified ***Liberato*** directions given in ***Anderson***. I think these modified ***Liberato*** directions are most apt to adopt to any situation where a judge alone or along with assessors is called upon to consider the guilt or otherwise upon conflicting evidence of the prosecution and defense.

[31] In any event in the subsequent decision in **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the majority in the High Court took up the position that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* As a result, it was held that a *'Liberato direction'* need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way, regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview. As stated in ***De Silva*** whether a Liberato direction is required will depend upon the issues and the conduct of the trial.

[32] Nevertheless, in **Murray v The Queen** (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. Therefore it was said in ***De Silva*** that in light of ***Murray***, the occasions on which a jury will be invited to approach their task as involving a choice between prosecution and defence evidence should be few.

[33] In **R v Li** (supra) it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. It was further held that the test is whether taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses

called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence.

[34] Coming back to the summing-up, it appears that the statement at paragraph 137 that '*Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you'* could and should have been avoided by the trial judge. However, the statement '*If you consider that the account given by the defence through the evidence* ***is or may be*** *true, then you must find the accused not guilty of either or both counts'* is in line with modified Liberato directions under (i) and (ii) expressed in ***Anderson.*** What is missing is a verbatim statement under modified ***Liberato*** direction (iii).

[35] ***De Silva*** [35] and [36] also observed:

> *'……. Nor did defence counsel seek a Liberato direction. The failure of counsel to seek a direction is not determinative against successful challenge in a case in which the direction was required to avoid a perceptible risk of the miscarriage of justice. The absence of an application for a direction may, however, tend against finding that that risk was present.'*
>
> *'The summing-up made clear the necessity that the jury be satisfied beyond reasonable doubt of the complainant's reliability and credibility. The Court of Appeal did not err in concluding that, when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a Liberato direction.'*

[36] In my view the trial judge's directions at paragraphs 8, 9, 26, 90 and 127 respectively are adequate to cover modified ***Liberato*** direction (iii) as Wheeler JA observed in ***Johnson***, the expression 'reasonable doubt' is apt to convey that a juror who is left in a state of uncertainty as to the evidence should not convict. This is particularly so in the light of the totality of evidence which militates against a total denial of the allegation by the appellant. In any event, I am of the view when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a direction exactly in line with the last limb [*i.e.* (iii)] of modified ***Liberato*** direction set out in ***Anderson***.

[37] In addition, the appellant's complaint has to be considered in the light of the legal position in Fiji, that the assessors are not the sole judges of fact. 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). This unique legal position in Fiji clearly provides an additional layer of safeguard particularly to the accused. Therefore, any perceived deficiency in the summing-up does not carry the same weight or have the same effect on the outcome of the trial in Fiji as in other jurisdictions where jurors are the sole judges of fact and the contents of the summing-up become so critical as far as the final outcome is concerned.

[38] Therefore, as stated by Calanchini P in ***Gounder***, assuming that there was any lack of directions in the summing up as complained by the appellant it had been rectified by the substantive judgment by the trial judge setting out the evidence and independently analyzing the totality of evidence including the that of the defense that supported the decision to enter a conviction against the appellant.

[39] In the circumstances, I hold that the trial judge had not shifted the burden of proof to the appellant to prove his innocence in the summing-up or in the judgment and this ground of appeal lacks merits.

02nd ground of appeal

[40] The appellant complains that the learned trial judge had failed to adequately address the assessors and himself on the inconsistencies of HD's evidence. It appears from the submission of his counsel that some complaints relate to alleged improbabilities of her evidence.

[41] The appellant questions as to why HD got into his vehicle and go away from Marine Drive in order to discuss the wages when no such proposition was placed before her. According to the complainant, Sara had informed her at home that the appellant

wanted someone to come along with her. After returning in his car with the appellant, Sara had come running and told her that the former wanted to talk to her in private about her wages. Sara had testified that in the evening on the day in question she was going to work for her first night at appellant's JJ's Motel and she took HD for job experience and both were picked up by him in his car. After Sara and HD were picked up, the appellant had said there will be no work that night since the business was slow and they therefore ended up at Marine Drive. On the following day even Jenet had asked her how her job at JJ's Motel was the previous day. It appears from the appellant's evidence that he was aware that HD was looking for a job experience at JJ's Motel. Thus, it is clear that although there was no such direct job offer by the appellant, HD had enough reason to believe that the appellant in fact wanted to discuss wages with her in private as he had done earlier with Sara. On the other hand there was no reason for HD to suspect any foul play on the part of the appellant as he was well-known to her and she need not have entertained any fear of going with him in his car. Defense witness Meli Tauvoli's evidence had revealed that at Marine Drive the appellant spoke to both Sara and HD about possible work at JJ's Motel.

[42] The appellant also queries why HD did not open the car door from inside, run away and complain to or seek help from someone in the aftermath of the alleged sexual abuse when she had the opportunity to do so because there was no evidence that HD was threatened not to run away whilst switching car seats. According to HD, switching of car seats had happened once they were back at Marine Drive but before proceeding to Hunters Inn. It is clear that by the time the appellant and HD returned to Marine Drive, all misdeeds had already happened and HD does not appear to have been under any apprehension of further sexual abuse by the appellant for her to run away or felt an imminent danger to complain to anyone around Marine Drive and seek help as the appellant had told her that he was now going to drop both HD and Sara home.

[43] The appellant also argues whether it was possible for the appellant to get her to suck his penis while only pulling down her skirts but not the shorts and then fingering her vagina and why HD did not resist the appellant but submitted to his dictates. The appellant has also raised concerns on inconsistencies of HD's evidence with that of

her sister Salome, mother Alanieta Dun and friend Janet with regard to how the appellant had narrated the way the appellant had sexually abused her. The differences highlighted are on the descriptions such as 'sucking the penis', 'sucking the balls' and 'sucking the dicks'. 'Using the hands to touch private parts', 'putting the hand up her private part and anus' and 'touching her private part in front' also have been highlighted. Given the environment HD was placed in by the appellant inside his locked car and in the context of what she had been subjected to these inconsistencies seem academic and only argumentative without real substance. No rational person would expect the victim of sexual abuse in the circumstances that HD was placed to describe the intrusive acts of the offender with mathematical accuracy.

[44] The appellant also posed the question if HD had not testified to the fingering of her vagina relating to count 02, which led to the appellant's acquittal at the close of the prosecution case, whether she could be believed on the rest of her evidence on the 01st and 03rd counts. If HD had wanted to falsely implicate the appellant in the second count, all what she had to do was to stick to and be consistent with her police statement. The fact that she had not do so at the trial but confined her evidence only to the allegations relating to the first and third counts show that she was not falsely implicating or fabricating evidence against him under oath. In any event, divisibility of credibility is well-recognized in law and the trial judge had addressed the assessors on this aspect at paragraph 138 of the Summing-up.

[45] The problem for the appellant is that most, if not all of the above issue had not been canvassed as trial issues. Had HD been confronted with those propositions under cross-examination, she may have been in a position to explain as to why she behaved in the manner she did and how the appellant managed to sexually abuse her the way she described. For the appellant to successfully urge appeal points, particularly involving matters of fact, he must have created an evidential basis for such a challenge at the trial. The appellant's trial counsel had not done so. Therefore, these arguments remain afterthoughts and the result of some degree of ingenuity on the part of the appellate counsel.

[46] The applicable test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) where the Court of Appeal held that same principles for inconsistencies.

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[47] In **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated on how to evaluate discrepancies as follows:

> *'[35] .....Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (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;'*

[48] Defence Exhibit 01 was a letter purportedly signed by HD addressed to the Director of Public Prosecutions (DPP) on 14 March 2016 stating *inter alia* that her statement recorded by the police was not true and no sexual assault took place. However, while admitting her signature she explained that her father had come to her school and shown only the signature area and got her signature. In fact, she had under oath accused her father of having tricked her by covering the contents and shown only the

signature area. The father had given this letter to her when she came to give evidence and asked her to lie about the incident. The appellant's trial counsel obviously knew that she was having the letter with her and questioned about it and marked it as a defence exhibit. She stood steadfast under cross-examination regarding this letter. However, HD had already given a statement to the police denying the contents of the letter at the instance of the DPP. Rather than affecting HD's credibility, DE01 demonstrates HD's unwavering resolve even in the face of trickery by her own father to tell the truth to court as to the offending committed by the appellant upon her.

[49] Sara who was supposed to corroborate HD going away with the appellant in his car turned hostile at the trial. She had even given a statement (08 April 2016- DE3) prior to that retracting her original statement (15 May 2015 – DE2). In DE3, while going back on her earlier statement, Sara had admittedly stated that Vicky had offered $1000 each to her and her sister to withdraw her earlier statement but failed to tell the police that what she had stated in her earlier statement was not correct.

[50] Janet who gave evidence on 17 October 2016 in line with her police statement corroborating HD's evidence, had sent a letter (DE5 – 18/10/2016) to the trial judge's clerk the day after stating that what HD had told her about her being sexually abused by the appellant was a lie. The prosecutor wanted that letter to be disregarded but the defence counsel suggested that she be recalled to clarify about DE5 and accordingly, she was recalled to give evidence on strange circumstances surrounding DE5 and a similar letter DE4 (11/10/2016). Thus, reading the record of proceedings in total and between lines, I could very well imagine the enormous pressure HD would have been put through not to come out with the truth at the trial against the appellant. One obviously needs a lot of character to withstand such pressure in the face of so much adversity.

[51] The learned trial judge had directed the assessors on all items of evidence of the prosecution witnesses and defence witnesses at length at the summing-up. He had also addressed them on how to deal with inconsistencies at paragraphs 114 and 124-126 of the summing-up. In the judgment, the trial judge had analysed the evidence of the same witnesses with regard to the credibility and weight to be attached and satisfied himself that the complainant was a truthful and credible witness whose

evidence along with the evidence of her sister Salome and mother Alanieta had proved the first and third counts beyond reasonable doubt. The trial judge had not failed to evaluate the evidence of Janet, Sara and the appellant and give reasons why he was not believing their evidence.

[52] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) the Court of Appeal held on the trial judge's duty when agreeing with assessors as follows:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[53] In **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) Keith, J said of the trial judge's duty referring to **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) as follows.

> *'[36] I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. ……..*
>
> *[37] But it is dangerous to elevate what should be best practice into a rule of law…… I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.*

[38] The critical question, therefore, is whether the trial judge's evaluation of the evidence and his reasons for convicting Chandra can readily be inferred from his summing-up….'

[54] As stated in ***Fraser*** the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court and therefore, what is crucial in appeal is if the trial judge's evaluation of the evidence and his reasons for convicting the appellant can readily be inferred from his summing-up and the judgment. I answer this question affirmatively.

[55] The alleged inconsistencies and improbabilities highlighted by the appellant in HD's evidence are not so material as to shake the foundation of the prosecution case. On my reading of the record of evidence, I see no reason to disagree with the learned trial judge. I am of the view that even after making due allowance for natural limitations of this court not having seen and listened to the witnesses the appellant is guilt had been proved beyond reasonable doubt on the record of proceedings [vide **Weiss v The Queen** [2005] HCA 81]. In my independent evaluation and assessment of the totality of the evidence, I think that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt [vide **Pell v The Queen**[2020] HCA 12 (07 April 2020), **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493)]. These cases have dealt with provisions similar to section 23(1)(a) read with the proviso of the Court of Appeal Act in Fiji and adopted in a number of Court of Appeal decisions.

[56] As stated by the Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, that the trial court has a considerable advantage of having seen and heard the witnesses and it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but based its decision on the reading of the whole record. I see no merits in the second ground of appeal.

03rd ground of appeal

[57] The appellant's grievance is that the trial judge had failed to adequately consider the evidence led by both parties during trial. It is alleged that the trial judge had not directed the assessors to consider the totality of evidence in deciding whether there is a reasonable doubt in the allegation levelled against the appellant. However, this is what exactly the trial judge had said at paragraph 139 of the summing-up. The appellant also submits that the trial judge had not adequately focused on the evidence of HD and her letter – DE1, Janet Cathy's evidence along with her allegedly failed attempt to withdraw her earlier police statement and her mother Sereana's evidence.

[58] On a perusal of the summing-up, it becomes clear that the trial judge had indeed addressed the evidence of the complainant at paragraphs 29-44, and out of them paragraphs 38-42 had been devoted to deal with DE1. Janet's evidence had been dealt with at paragraphs 57-71 and particular attention had been given to her evidence regarding the attempt to withdraw her earlier statement which involved WDC Irene Singh and police officer Maciu at paragraphs 60-71. WDC Irene Singh's evidence is found at paragraphs 72-79. The evidence of HD's sister Salome Dunn and mother Alanieta Dunn had been discussed at paragraphs 80-83 and 84-88 of the summing-up.

[59] Similarly, the trial judge had addressed the assessors on the appellant's evidence at paragraphs 91-94, Meli Tauvoli's evidence at paragraphs 95 & 96, Janet's mother Sereana Likusalusalu's evidence at paragraphs 97-100. The trial judge had analysed for the assessors the evidence of both parties at paragraphs 102-133 and particularly highlighted DE1 at paragraph 134.

[60] Not stopping at that, the trial judge had given his mind to all the contentious issues regarding the evidence of both parties in the judgment and evaluated and analysed their evidence *vis-à-vis* the weight and credibility. He had considered the evidence of Janet and that of her mother Sereana particularly in the context of Janet's attempted retraction allegedly *via* WDC Irene Singh and the letter DE4. In the end, the learned trial judge had accepted HD's evidence as truthful and reliable and rejected Janet's story of HD having told her that the allegation against the appellant was a lie. HD

had denied having said such a thing to Janet. The trial judge had given convincing reasons why he rejected Sara's evidence that she gave her original statement in support of HD's version under the influence of HD's family. The judge had believed Salome Dunn and Alkanieta Dunn particularly on their unchallenged evidence that the appellant came over and tried to reconcile and his son and co-workers tried to offer money to withdraw the allegation.

[61] Similarly, the learned trial judge had analysed in the judgment the appellant's evidence along with that of Meli Tauvoli and Serena Likusalusalu (Janet's mother) and rejected the appellant's case theory based on the evidence of Sara and Sereana that the whole purpose of the 'unfounded' allegation was to extort money from him or 'milking money out of a businessman'. However, neither HD nor Salome had been confronted with this theory by the defence. It was belatedly put to PW3 Alanieta but rejected by her. What was suggested was that HD and Sara demanded $200 for clubbing and $800 for shopping on the day of the incident which HD had flatly denied calling the appellant a liar. Even Sara who turned hostile against the prosecution had not uttered a word about making such demands to the appellant; neither did DW2 Meli Tauvoli. The appellant too in his evidence had not spoken to the demands for money on the day in question or the defence theory of any attempted extortion thereafter by HD or her family.

[62] Accordingly, this ground appeal has no prospect of success.

04th ground of appeal

[63] The appellant complains that the trial judge had not properly placed Meli Tauvoli's evidence before the assessors and erred in holding at paragraph 48 of the judgment that he was an untruthful witness.

[64] His evidence had revealed that the appellant was inside his car and at times came out and spoke to both Sara and HD about possible work at JJ's Motel. He had been working for the appellant since he left school and was quite close to his family. He had also said that he would not want to see the appellant going to prison. However, he asserted that neither Sara nor HD left the Marine Drive that evening with the

appellant. It transpired in evidence that Meli had given his statement to the police 11 months after the incident.

[65] The trial judge had adequately narrated Meli's evidence to the assessors at paragraphs 95 and 96 and analysed it further at paragraph 132. Then, the trial judge had given reasons why he did not believe his evidence at paragraph 48 of the judgment. The assessors too having seen his demeanour and listened to Meli had obviously not believed him.

[66] I see no reason to interfere with the finding of the trial judge on the credibility of Meli Tauvoli and this appeal ground will fail.

05th ground of appeal

[67] The argument put forward by the appellant is that the trial judge had not adequately addressed the assessors on recent complaint evidence of Janet.

[68] In **Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014) [and as previously held in **Senikarawa v State** [2006] FJCA 25; AAU 0005 of 2004S (24 March 2006)] the Supreme Court set down the law regarding recent complaint evidence as follows.

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the*

complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.'

[69] The trial judge had addressed the assessors at paragraphs 107-114 of the summing-up in line with the above guidelines. HD had said in her evidence that she had told Janet 'what had happened to her' and 'the story'. Janet in her turn had testified that HD had told her what had happened to her and elaborated it by saying that the appellant had asked CD to suck his dick meaning his private part and used his hands/fingers to touch her private part. Defence had not challenged the evidence of CD and Janet on recent complaint evidence. Therefore, it is very clear that HD had disclosed to Janet the details of unlawful sexual conduct of the appellant on the following day. The trial judge had treated Janet's evidence on this point as truthful in the judgment. Therefore, there is no merit in this complaint.

06th ground of appeal

[70] The appellant argues that by allowing the prosecution to serve Sara's statement – DE3 (Saraseini Nawa) on the day of the trial, his rights under section 290(1) of the Criminal Procedure Act and section 14(2) of the Constitution had been violated.

[71] After Sara's evidence was led by the prosecutor, it became clear that she had gone back on her original statement to the police (15 May 2015 – DE2) and the state counsel had informed court that Sara had given a subsequent statement on 08 April 2016 (DE3) which the prosecutor had honestly thought was among the disclosures but found it missing from them. She sought court's permission to serve it on the defence counsel who had no legal objection but insisted that he be given 30 minutes adjournment to discuss with the appellant. In fact the defence counsel had indicated that it was relevant to the defence. Thereafter, the prosecutor had made an

application to treat Sara as a hostile witness without objection from the defence and was allowed to cross-examine her on her original police statement and subsequent statement.

[72] The defence counsel had thoroughly examined Sara on her both statements and elicited her answers to all matters favourable to the defence. In fact, DE3 is completely favourable to the appellant. Section 290(1) of the Criminal Procedure Act deals with pre-trial orders and section 14(2) of the Constitution specifies rights of an accused charged with any criminal offence. I do not think that by serving DE3 on the defence counsel at that stage of the trial in anyway violated the right of the appellant or prejudiced his defence. On the contrary, in fact it helped him. No miscarriage had occurred in this instance. Therefore, I see no merits in this complaint.

07th ground of appeal

[73] The appellant submits that the trial judge caused a miscarriage of justice by recalling HD without any reminder as to her cross-examination, the appellant's evidence and any warning as to its misuse.

[74] This ground of appeal is completely baseless. The letter in question marked DE1 – 14 March 2016 was elicited by the defence counsel under cross-examination. HD described that DE1 was a result of trickery played on her by her own father who had obtained her signature without disclosing the contents which *inter alia* indicated that her police statement was not true and no sexual assault took place on the day in question. Obviously, the purpose of fabricating DE1 was to discredit HD who was never recalled to produce DE1.

[75] HD was in fact recalled by the trial judge at the end of the prosecution case as being essential to a just decision of the case and not after the defence case, in order to question her with regard to Janet's evidence recorded after her being recalled to testify on DE4 and DE5. DE4 and DE5 had been handwritten by Janet and dispatched to the trial judge's clerk who had given them to the trial judge on 18 October 2016 *i.e.* the day after she had given evidence. The defence counsel had unequivocally concurred with recalling Janet to clarify both letters. Both the

prosecutor and defence counsel had examined Janet. Therefore, it was essential for a fair trial and also in the interest of justice to allow HD to state her position regarding Janet's retraction of her evidence within 24 hours. No objection had been recorded on behalf of the appellant to the recalling of HD either. HD had said that she never told Janet that the allegation she made against the appellant was a lie. I see no substance in this ground of appeal.

[76] I must also place on record that on all matters of alleged instances of misdirection or non-directions, the defence counsel had not sought any re-directions despite the opportunity to do so at the end of the summing-up. Therefore, appellant is not even entitled to raise these as a points of appeal at this stage [vide **Raj v State** (supra), **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)]. In fact, none of these grievances had been raised even at the leave to appeal stage.

[77] The appellant's fresh complaints have to be considered in the context of section 23(1) of the Court of Appeal Act which provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed.

[78] The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In other words, although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice. Thus, for an appellant to succeed he or she must demonstrate that not only is there a miscarriage of justice but also there is a substantial miscarriage of justice.

[79] It has been held that if a verdict is unreasonable or cannot be supported having regard to the evidence it amounts to a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Pell v The Queen** [2020] HCA 12, [45]). The High Court of Australia has identified three non-exhaustive situations in **Baini v R** (supra) where substantial miscarriage of justice may occur namely (i) where the jury's verdict cannot be supported by the evidence (2) where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome (3) where there has been a serious departure from the proper processes of the trial. In the latter two categories, the court may find a substantial miscarriage of justice even if it was *open* to the jury to *convict*. However, finding that it was *not open* to the jury to *acquit* (that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice.

[80] However, if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. In other words, if the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.

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

upon that evidence (see **M v The Queen** (1994) 181 CLR 487, 494. See also **Inia v The Queen** [2017] VSCA 49, [53]).

[82] 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. This is the same with a non-direction. 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).

[83] In the light of the above discussion on the relevant law, I have examined the alleged omissions, instances of misdirection and non-directions by the trial judge. I have also considered the alleged improbabilities in HD's evidence. However, on the whole of the material on record, I cannot conclude that they are so significant and material that the assessors and the trial judge notwithstanding the advantage of having seen and heard prosecution witnesses ought to have entertained a reasonable doubt of their truthfulness, reliability and credibility. In my view, any reasonable fact finders would, on the whole of the evidence, without doubt have convicted the appellant. To me, the conviction was inevitable based on the written record of the trial. Thus, the verdict of guilty is supported by evidence and reasonable. There is no miscarriage of justice by reason of the verdict being unreasonable or not supported by evidence. Therefore, there is no necessity to invoke the proviso to section 23(1) of the Court of Appeal Act in this appeal. However, I am of the view that had it been necessary to consider the proviso the conclusion that there had been no substantial miscarriage of justice would have been open to the Court.

[84] Since the appellant had been refused leave to appeal, he must first obtain leave to appeal from the full court. In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019)

and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[85] For the reasons set out above, applying the above test of reasonable prospect of success, I will refuse leave to appeal against conviction. None of the grounds of appeal come closer to the threshold for the grant of leave to appeal. At the same time, adopting the usual practice I have treated the hearing before the full court as the hearing for the application for leave to appeal and the hearing of the substantive appeal. Accordingly, the appeal too will be dismissed under section 23(1) of the Court of Appeal Act.

Gamalath, JA

[86] I have read the judgment in draft and the conclusion of Prematilaka, RJA and I agree.

Nawana, JA

[87] I agree with the reasons and conclusions reached by Prematilaka, RJA.

Orders of the Court:

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

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL