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

CRIMINAL APPEAL NO. AAU 073 of 2019
[In the High Court at Suva Criminal Case No. HAC 89 of 2018]

BETWEEN : **LINO FEREI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, RJA
Qetaki, JA

Counsel : **Ms. L. Manulevu for the Appellant**
Mr. L. J. Burney for the Respondent

Date of Hearing : **07 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court at Suva on one count of rape (digital) contrary to section 207(1) and (2) (a) and of the Crimes Act No.44 of 2009 committed on 20 February 2018 at Nasinu in the Central Division.

[2] The assessors had expressed a unanimous opinion that the appellant was guilty of rape. The learned High Court Judge had agreed with the assessors and convicted the appellant accordingly. He was sentenced on 05 June 2019 to 07 years and 11 months of imprisonment with a non-parole period of 03 years and 11 months.

[3] On 11 June 2020, a single Judge of this court allowed leave to appeal against conviction[1] only on the second ground of appeal and the appellant had abandoned

[1] **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020)

his sentence appeal by tendering Form 3 on 13 May 2020. The second ground of appeal is as follows:

> *'**THAT** the learned trial judge directions relating to alibi both in law and in respect of the evidence was inadequate in all the circumstances of the case.'*

[4] The appellant's then solicitors had filed written submissions for the full court hearing only in relation to the above ground of appeal and the Legal Aid Commission (LAC) that had subsequently taken over the appellant's appeal also relied on the same submissions. State too had filed written submissions responding to those submissions and the counsel for LAC and the State made oral submissions only focussing the above ground of appeal at the hearing. It appears that the fifth ground of appeal below is related to the second ground of appeal and will be considered together.

> ***THAT*** *the learned judge erred in law and in facts when he failed to consider the following as proved facts in order make reasonable and rational inferences relating to alibi*
>
> *(i) The independent evidence of DW2 that he did meet and speak to the accused that morning on his way to work.*
>
> *(ii) The independent evidence of DW3 confirming that she had commenced work at 7.30am and did attend to the accused as the 6th patient at Valelevu Health centre by 8am or a little after 8am.*

Law relating to alibi

[5] Law relating to alibi is well established in this jurisdiction and elsewhere[2]. The salient features may be summarized as follows:

> *(i) Evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission[3]. An alibi asserts that, at the relevant time, the accused*

---

[2] **Dun v The Queen** [2019] VSCA 43 and **Regina v Deen Nelson** [2003] JMCA 1 (03 April 2003)

[3] per Fatiaki, J in **Andrew Ian Carter v State** (1990) 36 FLR 125)

was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility that the accused was at Y at the relevant time: Regina v Youssef (1990) 50 A Crim R 1 at 2-3and persuade the jury, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time[4].

(ii) *An accused putting forward an alibi as an answer to a charge does not assume any burden of proving it and it is a misdirection to refer to any burden as resting on the accused in such a case*[5].

(iii) *Although there is no rule of law that in every case where the accused relies on an alibi the judge must direct that it is for the prosecution to negate the alibi, such a direction is necessary if the jury seem in danger of supposing that, because an alibi has been put forward by the defence, the burden must be on the defence to prove it*[6].

(iv) *However, even where such a direction is not strictly necessary, it is nonetheless desirable*[7].

(v) *If the prosecution fails to satisfy the fact finders beyond reasonable doubt that alibi evidence should be rejected then they must acquit the accused.*

(vi) *It is for the prosecution to negative an alibi as in the case of self-defence or provocation*[8].

(vii) *By raising an alibi, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or any reasonable possibility that the alibi was true*[9].

(viii) *In Fiji it has been held that when an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the assessors should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused*[10].

(ix) *If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of an acquittal entered, however cogent the prosecution evidence would otherwise be*[11].

---

[4] Per Hunt AJA (Adams and Latham JJ concurring **R v Kanaan** (2005) 157 A Crim R 238; [2005] NSWCCA 385

[5] **R. v. Johnson** [1961] 1 W.L.R. 1478; 46 Cr.App.R.55.)

[6] ***Wood*** (1968) 52 Cr. App. R. 74); ***Denny*** [1963] Crim LR 191

[7] ***Anderson*** [1991] Crim. L. R. 361, CA; ***Preece*** (1993) 96 Cr. App. R. 264, CA.)

[8] See **Killick v The Queen** (1981) 147 CLR565; 37 ALR 407, **R v Johnson** (1961) 46 Cr App R 55; 3 ALL ER 969 and **R v Taylor** [1968] NZLR 981 at 985-6].

[9] See **R v. Small** (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)

[10] **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020)]

[11] See **Palmer v R** (1998) 193 CLR1; [1998] HCA 2; 151 ALR 16

[6] The question as to how the prosecution could disprove an alibi was discussed by the Court of Appeal in **Munendra v State** [2023] FJCA 65; AAU0023.2018 (25 May 2023) as follows:

> *'[17] One way in which a prosecutor can try to refute an alibi defense is by showing that the accused never gave notice of alibi at all or there was no reasonable explanation for the belated alibi notice. On a trial before any court the accused shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused has given notice in accordance with section 125 of the Criminal Procedure Act, 2009. The mere fact that the necessary information has not been given within the stipulated time does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for alibi evidence to be called. However, non-compliance of the statutory period for alibi notice stipulated in section 125 of the Criminal Procedure Act, 2009 is a matter that goes to the weight of an alibi [vide* ***Nute v State*** *[2014] FJSC 10; CAV0004.2014 (19 August 2014)]. Requiring the accused to file notice of alibi in advance is to give the prosecution time before trial to take steps, if it so wishes, and to check the veracity of alibi notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the alibi.*
>
> *[18] The prosecution also can refute an alibi defense by questioning the accused's alibi witnesses and challenging their credibility. It can also lead evidence in rebuttal either before or at the discretion of the court after the defence evidence. The latter is a quasi-exception to the general rule that all the prosecution evidence must be adduced before it closes its case unless something arises totally ex improviso in the defence case which could not reasonably have been foreseen.*
>
> *[19] Further, if the prosecution establishes beyond reasonable doubt that the accused was present at the crime scene by its own evidence, then alibi evidence has obviously failed to create a reasonable doubt in the prosecution case and the alibi would not succeed.'*

[7] The appellant's main complaint is that the trial judge had not directed the assessors on what is known as the intermediary position with regard to the appellant's alibi. What this intermediary position means is also discussed in ***Munendra*** in the following manner:

> *'[20] However, in proving beyond reasonable doubt that the accused was at the crime scene, the prosecution must remove or eliminate a reasonable possibility of him being somewhere else according to the alibi evidence. This could be considered the intermediary position with regard to an*

alibi the result of which is that if the fact finders neither reject nor accept the alibi but alibi evidence still make them regard it to be reasonably true, then the accused will have to be acquitted.'

[8] Firstly, if the fact finders, be they the jury, assessors or the trial judge accept the alibi, they would be obliged to acquit. Secondly, if they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. Thirdly, although they do not accept the alibi, they also do not reject it in the sense that they regard it as something which could reasonably be true, in such a case, they must acquit the accused[12]. In other words, if alibi is accepted, the accused must be acquitted as such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. If alibi is rejected, it does not follow that the accused should be found guilty, because the burden is still on the prosecution to prove the guilt of the accused beyond reasonable doubt. If alibi evidence is neither accepted nor is capable of rejection (*i.e.* alibi is neither accepted as true nor rejected as untrue), the resulting position would be that a reasonable doubt existed as to the truth of the prosecution evidence. This approach on intermediary position already taken in Australia, New Zealand and Sri Lanka was approved by the Court of Appeal in ***Munendra.***

[9] The trial judge had directed the assessors as to the law relating to alibi as follows:

> *46. When an accused takes up the position that he was elsewhere at the time of offence that is known as the defence of alibi. Please bear in mind that though an accused raises the defence of alibi, there is no burden for the accused to prove that he was elsewhere during the time the offence is alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the alibi is not true.*
>
> *47. When you consider the evidence of the accused regarding his alibi, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence.*

---

[12] See Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring) in **R v Amyouni** NSWCCA 18/2/88 unrep. BC8802201; per T. S. Fernando J. in **Yahonis Singho v. The Queen** (1964) 67 NLR 8 at 9-1

> 48. *However, you should also bear in mind that, you should not assume that the accused is guilty of the offence merely because you decide not to accept his alibi. You should remember that sometimes an accused may invent an alibi just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.*

[10] In my view, the direction by the trial judge '*When you consider the evidence of the accused regarding his alibi, if you think that the version of the accused …… **may be true**, then you must find the accused not guilty of the offence'* is quite adequate to express the idea embodied in the intermediary position on alibi and inform the assessors that they should acquit the appellant even if his version that he was elsewhere at the time of offence may be true which means that a reasonable doubt exists as to the truth of the prosecution version. As stated by the Supreme Court in **Khan v State** [2014] FJSC 6; CAV009.2013 (17 April 2014) with reference to a complaint that the directions on weight in terms of how to approach the answers in the caution interview were inadequate that *'There is no incantation which must be read here. The required guidance need not be formulaic'*.

[11] The appellant also finds it objectionable that the trial judge had directed the assessors '*You should remember that sometimes an accused may invent an alibi just because it is easier to do so rather than telling the truth.'* arguing that it plants a suspicion in the minds of the assessors that the appellant may be lying about his alibi.

[12] I think the appellant's fear is misconceived. In my view, the idea the trial judge has attempted to convey to the assessors is that even if they think that the alibi is fabricated or invented by the appellant instead of the truth or true defense that alone is not a reason to convict him as quickly added by the trial judge '*The main question remains the same. That is, whether you are sure that it was the accused who committed the offence'*.

[13] The standard JSB (Judicial Studies Board) direction to be given in UK was *'Even if you conclude that the alibi was false that does not itself entitle you to convict the defendant. The Crown must still make sure of his guilt. **An alibi is sometimes invested***

to bolster a genuine defense'. In March 2010 the Judicial Studies Board/JSB (now the Judicial College) in UK published the ***Crown Court Bench Book – Directing the Jury***, a new work by Lord Justice Pitchford. Then, ***The Companion to the Crown Court Bench Book "Directing the Jury"*** was prepared by Judges Simon Tonking and John Wait in 2011 (not as a substitute for Lord Justice Pitchford's work, which is the authoritative and contemporary work on the crucial function of the Crown Court judge, but complementary to it). ***The Companion to the Crown Court Bench Book "Directing the Jury"*** has the following directions on alibi:

- *An alibi is evidence that the defendant was somewhere other than alleged by the prosecution.*
- *It is not for the defendant to prove he was elsewhere, once the issue is raised it is for the prosecution to satisfy the jury so that they are sure that he was where the prosecution say he was.*
- *Even if the jury are sure that the alibi raised is false that does not of itself prove the guilt of the defendant:* ***there have been cases when a false alibi has been raised to bolster a true defence.***
- *If the jury are sure the defendant was present as the prosecution alleges, the jury must also be satisfied of any other elements of the offence that are in issue.*

[14] In the Court of Appeal (Criminal Division) - England & Wales in **R. v Harron** [1996] EWCA Crim J0221-2; [1996] 2 Cr. App. R 458 (21 February 1996), Harron appealed complaining *inter alia* that the trial judge should have told the jury to consider why the alibi had been fabricated, if that was their conclusion, warning that alibis were fabricated for other reasons than attempting to cover up guilt and the fact that M had lied about where he was did not prove he was where the Crown said he was (*Lesley* [1995] Crim.L.R.946). The court said, dismissing the appeal:

> *'.........., the judge had not given the standard JSB direction that: "Even if you conclude that the alibi was false that does not itself entitle you to convict the defendant. The Crown must still make you sure of his guilt. An alibi is sometimes invented to bolster a genuine defence." But he had adequately conveyed to the jury the guidance contained in the first two sentences of the direction. They would have understood that they had not only to be sure that the alibi was wrong, they had to be sure that the Crown's evidence was right. However, he did not tell them that an alibi was sometimes falsified to bolster a genuine defence and the question was whether, in the circumstances of this case, the omission was sufficient to render the conviction unsafe.'*

[15] In the end, the Court of Appeal in ***Harron*** was not persuaded that had the jury been told that alibis were sometimes falsely put forward to bolster an honest defense it would have affected their decision. Thus, in my view, not only was what the trial judge told the assessors not wrong but even the absence of it may not have affected their opinion that the appellant was guilty.

[16] The appellant also submits that the trial judge had not specifically directed the assessors that it was incumbent on the prosecution to disprove alibi evidence in addition to his general directions that though the accused raises the defense of *alibi*, there is no burden for him to prove that he was elsewhere during the time the offence is alleged to have been committed.

[17] The legal comments in ***Ram*** that *when an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the assessors should be directed that the prosecution must disprove the alibi*, were made in the following factual context.

> *[28] Before the trial commenced, the appellant applied for leave from the trial judge to file a formal notice of alibi The trial judge refused the appellant to file a formal notice of alibi but allowed him to lead evidence of his alibi as contained in his caution interview. In his caution interview, the appellant first said he was at his home when the alleged incident arose. When the police verified the appellant's alibi with his mother, the mother was unable to confirm the appellant's alibi. Upon further questioning, the appellant said he was at his neighbour's home drinking kava when the alleged incident arose and he lied about the initial alibi to protect his mother. There was a witness called by another co-accused who confirmed that the appellant was with him drinking kava at the time of the alleged incident.'*

> *[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [2006] EWCA Crim 2000; [1996] 1 Cr App R 39; **R v Harron** [1996] 2 Cr App R 457). In the present case, the appellant had admitted that initially he had given a false alibi to protect his mother but the summing up contains no directions on alibi at all. This ground succeeds.*

[18] In my view, the comment in ***Ram*** that '*when an accused relies on alibi as his defence,…….., the assessors should be directed that the prosecution must disprove the alibi'* appears to have been a slight overstatement of the correct legal position that could be gathered from the decisions cited in support at paragraph [29] in ***Ram*.** In the context of ***Ram*** the trial judge does not appear to have given any or adequate guidance on how the assessors should approach the question of an admitted lie by the accused about his alibi. Though, a direction that the prosecution must always disprove the alibi may have been required in ***Ram*** it cannot be suggested as a general legal proposition that such a warning is invariably required in every case, for each case turns on its own circumstances. However, I reiterate lest there be any confusion that, even though where such a direction is not strictly necessary, it is nonetheless desirable to give such a direction.

[19] As stated earlier, in the context of trials by jury the law is that there is no rule of law that in every case where the accused relies on an *alibi* the judge must direct that it is for the prosecution to negate or disprove the *alibi.* Such a direction is necessary if the jury seem in danger of supposing that, because an *alibi* has been put forward by the defense, the burden must be on the defense to prove it, even though where such a direction is not strictly necessary, it is nonetheless desirable to give such a direction.

[20] This proposition of law emphasizes that while there may not be an absolute rule requiring the judge to instruct the jury explicitly that the burden is on the prosecution to disprove the alibi, such a direction is advisable to prevent any misunderstanding on the part of the jury, for if the jury mistakenly believes that the defence must prove the alibi, it could unfairly prejudice the accused's case. Therefore, even if not strictly required by law, it is considered desirable for the judge to provide clear instructions to the jury regarding the burden of proof in relation to the alibi defence. This helps ensure a fair trial and upholds the principle of the presumption of innocence until proven guilty beyond a reasonable doubt.

[21] However, desirability of a certain direction cannot be elevated to an absolute rule of law to be chanted as an incantation unless the facts and circumstances of the case demands it to ensure a fair trial and prevent a substantial miscarriage of justice. For

example, in a slightly different context, it was held with regard to a Lucas direction that though usually required in the case of alibi, it was not suggested that it was required invariably (see ***Burge and Pegg***, The Times, April 28, 1995). On the contrary in cases in which a jury was invited by the Crown to place reliance on lies as supporting its case, and there was a danger that they may think that the telling of lies was a fact from which they could infer that the Crown's evidence must be correct, or in cases in which the accused was shown to have lied about a matter which was not directly relevant to guilt but which might be thought so by the jury, guidance was needed (see ***Harron***). In ***Landon*** [1995] Crim. L.R. 338, Hobhouse L.J. emphasised that a *Lucas* direction should be given where lies told by the defendant were relied upon by the Crown, or might be relied upon by the jury, as additional evidence of guilt, and that the need for the direction depended upon the circumstances. Where there was no distinction between the issue of guilt and the issue of lies, it was unnecessary to enter upon the *Lucas* question at all. The *Lucas* situation only arose where, on some collateral matter, and due to some change in evidence or account by the defendant, there was scope for drawing an inference of guilt from the fact that the defendant had, on an earlier occasion, told lies, or, on some other matter, told lies at trial.

[22] Therefore, an analysis of the evidence in this case is necessary to decide whether it was incumbent on the trial judge to have directed the assessors that the prosecution must disprove alibi evidence in addition to other directions. I shall also consider the appellant's final argument, though not being part of the sole ground of appeal, arising from the following paragraphs in the appellant's written submissions as to whether even if the trial judge had given the direction that the prosecution must disprove alibi evidence, it would have changed the outcome of the case.

> *3.4 In his evidence, defence witness number 2 stated that on the morning of 20/02/2018 he left his home at around 6.35am and it took him 15 minutes to reach the Chinese shop to wait for the 7 o'clock bus where he met the accused. He could not confirm what time he met the accused. At that time, the 7 o'clock bus hadn't arrive (Volume 2 of the Copy Record, page 489).*
>
> *3.5 Further, defence witness number 3 stated that she examined the accused at the Valelevu Health Centre on 20/02/2018 by 8am or a little after 8am. The accused was the sixth patient that she saw that morning, who came with a*

complaint of watery diarrhoea. The accused was treated with oral antibiotic and ORS (Volume 2 of the Copy Record, page 490).

3.6 *When the independent evidence of the accused, the second defence witness and the third defence witness is taken as a whole, it is apparent that there is a chain of events regarding the appellant's whereabouts on the morning of 20/02/2018 which does make it* ***possible*** *that the appellant was at Valelevu Health Centre.*

Prosecution evidence

[23] According to the complainant, she woke up on 20 February 2018 upon hearing a sound ("door bang") and then soon found the appellant in her room pulling her pants. When she opened her eyes, he was on top of her with his finger inside her vagina. She pushed him and he pushed her back and he then placed his hands on her sides to prevent her from moving. She said the appellant was moving his finger inside her vagina to arouse her and he did this for about 15 to 20 minutes. In the process he also kissed her. She said that at this time only the appellant was at home and she knew that his father, mother and two siblings would leave the house around 6.30am to catch the 6.30 bus. According to the complainant, this incident started after 6.30am. The appellant's father Mario Ferei (DW4) also confirmed that he left with the others between 6.30am and 6.35am and while they were leaving the appellant was awake and the complainant was sleeping and he found out about this incident when his niece, Sofi called him around 8.15am to 8.20am the same day.

[24] The complainant's aunt Hailey Elizabeth Pauline Ferei's (PW2) evidence was that the complainant did not tell her what happened over the phone before or after 7.00am and she only told her that she is scared of the appellant and therefore requested her to come soon. It took PW2 about 30 minutes to reach the complainant after she got the call and reached the house between 7.30am and 8.00am. She called the appellant while she was inside the house and when she asked him whether he was going to work, he told her that he would go to work. The appellant asked her for a cigarette roll and she gave him $2. The appellant then left and never came back. She and the complainant left the house around 7.55am. Despite his own evidence of meeting Pauline at the house, surprisingly it had been suggested to PW2 in cross-examination

on his behalf that what she said about the appellant being in the house cannot be true because he was at the Valelevu Health Centre, but she denied and said that he was at home when she arrived.

Defense evidence

[25] The appellant took up the position that he was not in his room in the house at Caubati at the time of offence and therefore he could not have committed the alleged offence. According to him, he left the house at 6.45am on 20 February 2018 and met DW2 at 6.55am that day on his way to the main road and then he was at Valelevu Health Centre at 7.15am. He said that the doctor, DW3 examined him and gave him a sick sheet and he was at the Valelevu Bus Stop after obtaining his prescribed medicine from the pharmacy, at (almost) 8.00am. He also said that he was informed by his mother about the allegation while he was on the bus who also informed him that a complaint had been lodged at the Totogo Police station, and then he went to the Totogo Police Station around 8.45am. The appellant also said that he met Aunty Pauline at the house before he left home in the morning and had a conversation with her and she gave him $2 when he asked for a cigarette. This was at 6.45am.

[26] DW2 said that he did meet the appellant near the Chinese Shop on the day in question while he was waiting for the 7.00am bus, but he cannot remember the time he met him. DW2 also admitted that he had not mentioned the time he left home that day and that he was waiting for the 7.00am bus, in the two police statements he had made. The doctor, DW3 said in her evidence that she starts work at Valelevu Health Centre around 7.30am and she would have seen the appellant by 8.00am or little after 8.00am.

[27] In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** (AIR 1983 SC 753), it was observed that undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness cannot be expected to possess a photographic memory and to recall the deals of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have been

anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus, minor discrepancies are bound to occur in the statement of witnesses. It is unrealistic to expect a witness to be a human tape recorder. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time sense' of individuals which varies from person to person. Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps, it is a sort of a psychological defence mechanism activated on the spur of the moment.

[28] The differences in time spoken to by the complainant as to the time of the incident and the appellant's time of his leaving the house should be understood in the context vividly explained in ***Bharwada Bhoginbhai Hirjibhai.*** What cannot be disputed or is rather common ground is that when Aunty Pauline arrived home in response to the complainant's complaint, the alleged incident of sexual abuse had already happened but admittedly the appellant was still at home. Hence, no possibility of the appellant being at Valelevu Health Centre at the same time. Therefore, all what the appellant and his witnesses said about different timelines in relation to various other incidents in the morning in an attempt to show that he could not have been at the crime scene at the time of the alleged incident, pales into insignificance. In short, taken together the evidence of the complainant and his witnesses cannot show that his alibi is true or even may be true. On the contrary it is clear that it is not true. He was definitely at the crime scene at or during the time of the incident.

[29] Therefore, following the assessors and the trial judge, I have no hesitation in rejecting the complainant's alibi as untrue. I also hold that in the totality of the evidence and the alibi directions in the summing-up, it was not mandatory in this case for the trial judge to have said to the assessors that the prosecution must negate or disprove the *alibi,* because the assessors were not in danger of supposing that, because an *alibi* has been put forward by the defence, the burden must be on the defence to prove it. The absence of such a direction has nor deprived the appellant of a fair trial or caused him a miscarriage of justice leave alone a substantial miscarriage of justice.

[30] Even if, for the sake of the argument if one assumes that the omission of the direction that the prosecution must negate or disprove the *alibi* has caused a miscarriage of justice as argued by the appellant, adopting the words of Viscount Simon, L. C., in **Stirland v. Director of Public Prosecutions** (1944 AC 315, 321, 1944 30 Cr. App. Rep. 40, 47), I ask myself the question : 'Whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant ?', and my answer is 'Yes'. The case against the appellant is a 'formidable' and 'overwhelming' one. It is significant, for obvious reasons, that it is not the contention of the appellant that the opinion of the assessors and the verdict of trial judge was 'unreasonable' or that it 'cannot be supported having regard to the evidence'.

Sentence appeal

[31] Though the appellant had tendered a Form 3 to abandon his sentence appeal, the counsel for the appellant or the respondent did not urge this court to inquire into that application and examine the appellant in line with **Marisewa v The State** [2010] JFSC 5; CAV 14 of 2008 (17 August 2010). Most probably, both counsel overlooked it.

[32] Therefore, to be absolutely fair by the appellant, I examined the sentencing order to see whether there has been any sentencing error in the light of section 23 (3) of the Court of Appeal Act which governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the

Court of Appeal laid down the applicable principles in exercising those powers as follows:

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'*

[33] I am convinced that there has not been any sentencing error involved in the sentencing process. The sentence is well within the tariff for adult rape i.e. between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338 and is not disproportionate to the gravity of the offence.

Mataitoga, RJA

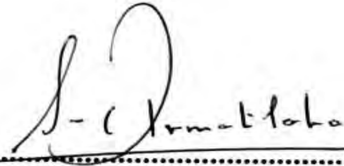
[34] I concur with the reasons and conclusion of Prematilaka, RJA.

Qetaki, JA

[35] I have considered the judgment by Prematilaka, RJA in draft and I agree with it, its reasoning and the orders.

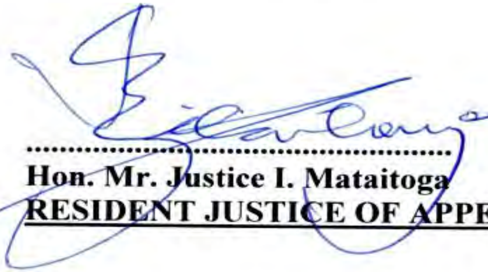
Orders of the Court:

1. Appeal against conviction is dismissed.
2. Appeal against sentence is dismissed.



....

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



....

Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

....

Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent