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

CRIMINAL APPEAL NO. AAU0020 OF 2019
[Lautoka Criminal Action No: HAC 205/13]

BETWEEN : **THE STATE**

Appellant

AND : **SOHEB NASIR ALI**

Respondent

CRIMINAL APPEAL NO. AAU0060 OF 2019
[Lautoka Criminal Action No: HAC 205/13]

BETWEEN : **SOHEB NASIR ALI**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Mr. Anil J. Singh and Ms. S Z Khan for the Appellant**
Mr. M Vosawale for the Respondent

Date of Hearing : **8 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Mataitoga, RJA

[1] I concur with the reasons and conclusions of this judgment.

Qetaki, JA

Background

[2] This judgment relates to two criminal appeals arising from a Judgment of the High Court at Lautoka delivered on 7 February 2019 and sentence delivered on 8 February 2019.The first, State v Soheb Nasir Ali, Criminal Appeal No. AAU 0020 of 2019 is an appeal against sentence, and the second, Soheb Nasir Ali v State, Criminal Appeal No. AAU0060 of 2019 is an appeal against conviction. Soheb Nasir Ali, aged 19 was indicted in the said High Court on a single count of rape contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009, committed at Nadi in the Western Division. The victim was aged 12 years and 11 months at the time of commission of the offence.

[3] The amended Particulars of Offence stated: *"Soheb Nasir Ali between 1st day of October 2013 and 31st day of October 2013 at Nadi in the Western Division, penetrated the vagina of Crystal Divashni Grace, aged 12 years and 11 months with his penis."* The learned trial judge agreed to amend the date of the offence on the information, which he justified subsequently in paragraphs 3, 4 and 5 of the judgment in the following terms:

> *''3.] An earlier information had stipulated the date of the offence to be 1st October 2013 and this amended information enlarged the date of offence to be within the month of October 2013.*
>
> *4.] Counsel for the Defence had no objection to this amendment but after the close of the Prosecution Case made an application to have the proceedings declared a nullity on the basis that the amended information was not put to the accused for plea. The Court disallowed this application.*
>
> *5.] Pursuant to section 214(9) of the Criminal Procedure Act 2009 the Court ordered the amendment to be made in accordance with the uncertainty as*

to the date of the offence. Such amendment was made, the Court finding that the amendment of the time frame did not embarrass or prejudice the accused in his defence, he already having entered a plea of not guilty to the charge on the earlier information."

[4] At the conclusion of the summing -up on 06th February 2019 the majority of assessors' opinion was that Soheb Nasir Ali was guilty of the charge of rape. The learned trial judge agreed with the majority assessors in his judgment delivered on 07 February 2019. He convicted Soheb Nasir Ali and on 08 February 2019 sentenced him to 03 years of imprisonment without fixing a non-parole period.

[5] The State, aggrieved by the learned trial judge's decision, filed a timely appeal against sentence on 08 March 2019 and written submissions on 18 August 2020. The respondent had tendered its written submissions on 16 October 2020. Leave to appeal was allowed by a single judge on 08 December 2020.

[6] Soheb Nasir Ali, was also aggrieved with the learned trial judge's decision to convict him of the charge of rape. He lodged an application for enlargement of time for leave to appeal against his conviction on 30 May 2019. Leave to appeal against conviction was allowed on 8 December 2020 granting enlargement of time to appeal against conviction on grounds 1, 2, 6 and 8.The learned single judge stated that grounds 3,4,5,7,9,10 and 11 were to be considered by the full court and the record of trail proceedings are available.

[7] I propose to deal with the conviction appeal first, as if allowed there may be no necessity for the Court to deal with the sentence appeal by the State.

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[8] The grounds of appeal are the same as those before the learned single judge at the leave stage, and the appellant had filed written submissions through counsel in support of the conviction grounds on 27 July 2022. The respondent had filed its response on 7 February 2024.

[9] The appellant had also presented an affidavit dated 14 December 2023, and filed on18 December 2023, paragraph 3 of which stated the reason for its making, as follows:

> *"3. I have been informed and I verily believe that the Honourable Court of Appeal on the 1st of December 2023 upon hearing my Counsel ordered that my Counsel Anil J Singh file an affidavit highlighting the conduct of the judge of the High Court Mr Paul Madigan, who conducted the second trial.*
>
> *4. I am deposing this affidavit instead of my Counsel so as not to compromise my Counsel's appearance before this most Honourable Court."*

[10] The evidence obtained at the trial as contained in the summing–up at paragraphs [14] to [17] are as follows:

> *'' [14] The first prosecution witness was the alleged victim, Crystal. She is now 18 and married with a child but in October 2013 she was 12 years and 11 months old. Her birthday she told us is on the 17th November 2000.She described events of the 8th October 2013 when she had been out with her mother and had come back home and was there alone. Soheb whom she identified as the accused came to the door and said he wanted to use her laptop. She knew Soheb from the Youth Club she attended once a week with her younger brother. Crystal let him in and went to her room to get the laptop. He followed her into her room, pushed her on the bed and tried to remove her clothes. He took his pants down, held her hands and covered her mouth. He penetrated her with his penis. It was mid-morning on a week day. He threatened her not to tell anybody and warned of shame to her family. He left. She washed and felt weak and waited for her Mum to come home which she did bringing other relatives with her. Crystal did not say anything. She was scared, weak and shocked.*
>
> *[15] Soheb came back on 23 October 2013 took her hand and asked her if she had told anybody. She ran into her mother's room and locked the door. She called Mum telling her to come home quickly and then she let Soheb into the room. They both sat on the bed, he playing with the laptop and she lying beside him under a blanket.*
>
> *[16] Mum did come home and found them on the bed together. She started to beat him telling him 'I told you not to come here' her farther arrived and the matter was reported to the Police at Namaka. Crystal was sent for a medical examination where it was revealed that she was no longer a virgin.*
>
> *[17] In cross examination of this witness, Counsel for the defence spent a long time dealing with the inconsistencies he says exist between her evidence and the statement she made to the Police."*

Grounds of Appeal

[11] As at the leave stage, the appellant urged eleven (11) grounds of appeal against conviction, as follows:

> **Ground 1**
> *That the learned trial judge erroneously and contrary to rules of fair trial introduced confessions into evidence when the prosecution was not relying on it and had not lead any evidence on it up to that stage thereby making the trial a nullity, he further refused to instruct assessors to ignore the answer extracted by him from the Police witness thereby allowing prejudicial evidence to be before the assessors.*
>
> **Ground 2**
> *The learned trial judge further after defiance attempted to clarify the issue in ground 1 wrongly allowed prosecution to use the evidence stating it was rebuttal evidence, he allowed assessors to hear objections and made rulings without proper considerations thereby causing a miscarriage of justice.*
>
> **Ground 3**
> *The learned trial judge wrongly prejudiced the trial by unfairly accused defence counsel of staring at the assessors and the judge repeatedly in presence of assessors thereby causing a miscarriage of justice.*
>
> **Ground 4**
> *The learned trial judge erroneously prevented cross examination on inconsistencies between evidence at trial with that of earlier trial stating he didn't care what was said before judge Sharma thereby preventing cross examination on prior inconsistent statement.*
>
> **Ground 5**
> *That the learned trial judge failed to allow cross examination on the fact the complainant had completely repudiated her Police statement not giving any further statement to police instead relied on a letter she wrote to DPP office which was not served on defence until 2018, the learned trial judges conduct allowed a miscarriage of justice.*
>
> **Ground 6**
> *The manner in which the learned trial judge conducted the trial breach rights of accused person enshrined in the Constitution of the Republic of Fiji and as such the trial was a nullity and the conviction is unsafe and contrary to evidence.*

Ground 7
The prosecution erroneously refused to adduce medical evidence, as the same was more consistent with the accused version then that of the complainant causing a miscarriage of justice.

Ground 8
The Prosecution unfairly adduced evidence from the Record of Interview when they had indicated that they were not relying on the same making the voir dire unnecessary, failing their duty to be fair.

Ground 9
The learned trial judge kept interrupting the trial stating that consent is no defence whilst that may be true it did not negate denial altogether with no medical forensic evidence.

Ground 10
The Prosecution attempted to change its case as in the brief of evidence to meet the contents of the undated letter from the complainant after the two civilian witnesses had opportunity to discuss their evidence.

Ground 11
The learned trial judge hearing the first trial erroneously ordered a mistrial when the evidence of the complainant was thoroughly discredited before the assessors thus allowing prosecution to change its case to meet the contents of an undated letter thereby a grave miscarriage of justice.

[12] At the leave stage, the learned single judge, had considered grounds 1, 2, 6 and 8 together. Grounds 3, 4, 5, 7, 9, 10 and 11 cannot be dealt with, as the trial proceedings were not available then. The learned single judge did allow the application for leave to appeal against conviction based on grounds 1, 2, 6 and 8.

[13] At paragraph [31] of the Ruling the learned single judge stated:

"The full court would consider the contention of the respondent that the evidence of the victim and her mother was sufficient to sustain the conviction, upon consideration of the evidence against the appellant as a whole excluding the impugned incriminating evidence and decide whether the verdict was unreasonable or cannot be supported by such evidence under section 23(1) of the Court of Appeal Act.

Full Court of Appeal

[14] **Appellants' Case-Grounds 1, 2 and 8** - These grounds relate – (i) to the alleged improper admission of confession evidence by the learned trial judge, which is viewed by the appellant as erroneous and contrary to rules of fair trial. At the material time, the Prosecution was not relying on confession evidence, and had not led any evidence on it. As such the trial was a nullity; (ii) the learned trial judge refusal to instruct assessors to ignore the answer extracted by learned trial judge from the Police witness. This allowed prejudicial evidence to be placed before assessors. It is submitted that after defence had attempted to clarify the admission of confessions, the learned trial judge wrongly allowed the Prosecution to use the evidence stating it was rebuttal evidence; (iii) the learned trial judge allowing the assessors to hear objections and made rulings without proper considerations thereby causing a miscarriage of justice, and (iv) the Prosecution failing in their duty to be fair, by unfairly adducing evidence from the Record of Interview after they had earlier indicated that they were not relying on the same, making the holding of the *voir dire* unnecessary.

[15] The written submissions of the appellant highlighted extracts from the trial evidence to support the conviction grounds and these were re-emphasized orally at the hearing, including these:

(a) on first day of trial before Justice Sunil Sharma the respondent representatives informed the Court she would not be relying on the confession-Page 223, Vol II of Records. Ms. Kiran:'' *Not relying on the confession."*

(b) Respondent, in its case called officer DC3217 Avinesh Narayan, and after he was examined and cross-examined, there being no re-examination, the learned trial judge erroneously asked the police officer what was contained in the Record of Interview. The police officer said that the appellant admitted the offence of rape. It was pointed out that the confession was not part of the Prosecution case and a request was made that that evidence be struck out. The learned trial judge refused

the request and tried to justify/explain his question -see pages 319 & 320, Vol II of Records):

''Mr. Singh: What did he say in the interview?

Avinesh: He admitted to the offence My Lord.

Judge: The offence of?

Avinesh: Rape

Judge: Any question arising from my question Mr Singh?

Mr. Singh: My Lord that's a very wide question. For 2 days interview to be summarized in that way the prosecution Ms. Kiran had informed me very specifically that the prosecution are not relying on the record of the...

Judge: I guess that at the end of her examination.

Mr. Singh: And further more Your Lordship there was a voir dire requested and we withdrew the voir dire because the record of interview was not been relied on.

Judge: That's very good or very well.

Mr. Singh: Yes, very well and therefore for that last question should be struck out from the record.

Judge: That was introduced in the examination in chief that he made an interview. It's a logical question from the bench what did he say in the interview whether a prosecution is relying on the interview or not is different. It's a proper question and I am not going to struck it out. ……. I am not covering up for their not using the interview. It's a natural flow of question from examination in Chief Mr. Singh, what happened in the interview and it's a logical answer. There is no re-examination.

(b) Admission of unlawful evidence is prohibited under section 14(2) (k) of the Constitution. The challenged confession and discarded by the Prosecution is tantamount to unlawful evidence and the judge even after being informed continue with its use, with crushing effects on the appellant.

(d) The appellant gave evidence regarding the Record of Interview (pages 342 to 344 of Record) and the learned judge overbearingly interfered and in the process, the

learned judge suggested that the Record of Interview will soon become evidence by way of rebuttal-see page 343, Vol II of Records:

Mr Singh: You will see in the records.

Judge: We are going to be seen that interview before too long, aren't we? Because you keep opening it up. Carry on. You should have left the interview alone Mr Singh.

Mr Singh: That was brought in by you, My Lord.

Judge: It wasn't and you didn't had to prolong it. But now you have made it.

(e) At page 357, Vol II of the Records, the Prosecutor then in cross-examination of the appellant, and knowing the Record of Interview was challenged, and with the knowledge of the fact that the DPP undertook/stated to Court that they will not use the confession, chose to ask question about the interview:

''Ms. Lata: Mr. Ali you said that you did not admit anything in your Record of Interview about the sexual intercourse with Crystal?

Mr. Singh: I object to that question.

Judge: Why Mr. Singh.

Mr. Singh: The Prosecution did not rely on the Record of Interview in their case.

(f) After objection was made by the Defence Counsel, the learned judge responded in the manner following at page 358, Vol II of Records:

Judge: You told us in chief yesterday that when the Police interviewed you, you denied rape or sexual intercourse, that's what you said when asked by your counsel.

Soheb: He is saying that he didn't commit any rape or sexual.

Judge: You are saying you didn't say that to the Police?

Soheb: I have told the Police officers My Lord that I did not do anything.

Judge: <u>Well, that's a lie isn't it? That's not true</u>. (Underlining added)

Soheb: No, My Lord.

Judge: Show him the record of the interview please.

Soheb: The Police officers did not ask me any questions.

Judge: Mr. Ali. Can you tell the document which is before you?
Soheb: Yes.

(g) The prosecutor carrying on from where the judge left off (above) wrongly asked the following questions – mid page 358 Records:

''Ms. Lata: What is the document, is it the record of your interview?
Soheb: Yes, My Lord
Judge: It has been signed by you?
Soheb: Yes, My Lord.
Ms. Lata: And you have signed on all the pages of the interview?
Soheb: Yes, My Lord the signatures are there in all the pages.
Ms. Lata: Mr. Ali, can you go to question-and-answer number 54. When the Police asked you that what happened next, you told the Police We that Crystal came inside the room where you were and then I asked Crystal that it is OK with her and then she agreed and we had sex on the bed, do you agree.

Counsel submitted that in **Commonwealth of Pennsylvania v William Henry Cosby Jr**. (January 31, 2022) the United States Supreme Court refused to review Mr Cosby's sexual assault convictions. The appeal was allowed because many years earlier when the matter came to light, a prosecutor made a promise to Cosby's lawyers that he would never be charged. The prosecutor who made the promise had never put anything in writing or told anyone in his office about it. The never mentioned it in public until new evidence emerged and the case was reopened a decade later. At trial Cosby was convicted, however on appeal the Supreme Court of Pennsylvania ruled *"Whether or not the supposed deal was ironclad, Cosby thought it was when he gave incriminating testimony in a lawsuit. The principle of fundamental fairness that undergirds due process of law in our criminal justice system, demands that the promise be enforced":* Per Justice David N Wecht. Cosby was immediately released from prison. Case is not binding in Fiji but has substantial persuasive value.

Here the promise not to use Record of Interview was made in open court. Though not initially used by prosecutor, the prosecutor fell into error by using it because of the judge allowed it. A prosecutor's duty includes: as a minister of justice, an advocate and an officer of the Court. The prosecutor must adhere to the professional and ethical standards required of the profession; A prosecutor must not compromise his or her professional standards to please his or her instructing officer, the Court or third party including any complainant, witness, investigative or referring authority. Counsel for the prosecution unlike counsel for the defence in a criminal case or counsel instructing in civil matters, owes a wider duty to the Court and to the public at large to conduct his or her case moderately albeit firmly; and The prosecutor as administrator of justice must not strive for a conviction. Counsel submitted that the conviction obtained is tainted and the conviction should be set aside.

(h) At page 359, Vol II Records, the learned trial judge again questioned the appellant, as follows:

Judge: So, it's not true that you told the Police you didn't have sex, is it?

Soheb: I did not say anything to the Police.

Judge: We have seen you answered that question 54. You said we had sex on the bed.

Soheb: Prior to this My Lord he has inform the Court when the Police officers were writing the statement, I was been beaten up by some of the other officers inside the tea room.

Judge: This is a different question. We just using the statement to your credibility. You told us that you never told the Police you had sex with her and now we can see that in the interview that you did tell the Police you had sex with her.

Soheb: I did not say anything to the Police officers My Lord. They were beating me up.

Judge: You have just told me a minute ago that that is written in your statement and that's what you said.

Soheb: The one I have stated My Lord it was written by someone with a pen but this is the one they just only asked me to sign.

[16] The appellant cited a statement by former Australian High Court Judge Justice Sir Michael Kirby (2014) 14 QUT Law Review 1 at 10, on the issues of judicial bullying, said:

"..this include conduct such as displaying personal animosity disrespect towards advocates or litigants or their arguments, court rudeness, arrogance towards advocates or colleagues, gossiping and laughing at private conversations with other judges during argument. This sort of conduct is clearly designed to, and has the effect of, alienating the advocates and litigant. Such conduct creates an unfavorable impression of the judges and the court process."

[17] Counsel referred to **Dietrich v R** [1992] HCA 57; (1992) 177 CLR 292 in his submission and quoted extensively from it on the right of an accused to receive a fair trial according to law being a fundamental element of the criminal justice system

[18] Counsel also referred to **Von Starch v Queen (Jamaica)** 2000 UKPC 5(28 February 2000) on the responsibility of judges where their Lordships stated (Privy Council) …*the function and responsibility of the judges is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to a jury in the way he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there."*
Counsel submitted that the conduct of the learned trial judge in this case before the assessors made this trial an unfair trial.

Respondent's Submission on Grounds 1, 2 and 8

[19] Counsel for the respondent recognized that he appellant's complaint in these three grounds of appeal is primarily on the issue of fair trial. The prosecution had led the evidence of the investigation officer (PW3), his evidence was he was the investigation officer and conducted the caution interview of the appellant. The evidence led are captured at pages 315 to 317, Vol 2 of Copy Record); and page 240 is also relevant, where the learned judge had asked questions to the interviewing officer clarifying the issue led in chief by the prosecution.

[20] Counsel submitted that a complete study of the Record of PW3's evidence it is apparent that the prosecution led evidence of PW3 to tender the birth certificate of the victim. The appellant's counsel during the evidence in chief of the appellant asked the following questions-see page 338, Vol 2, Copy record:

Mr Singh: Were you taken to the Police Station? Sorry, to the hospital?
Soheb: After the interview My Lord.
Judge: What was the interview?
Soheb: They did not ask much to me My Lord.
Judge: What was the interview about?
Soheb: They asked me whether I raped or not.

[21] Counsel for the appellant also asked these questions in chief to the appellant-see page 342, Vol 2 of Copy Record:

"Mr Singh: Now that you have read the interview with your counsel the conversation regarding sex did you tell that to the Police?
Judge: please say that again it's very unclear.
Mr Singh: You asked the Police officer you would recall Your Lordship whether he admitted or denied.
Judge: Now you are opening up the interview again.
Mr Singh: No, I am not.
Judge: You are opening it up. Anyway what is your question to the witness?
Mr Singh: So you were beaten up and made to sign the interview.
Soheb: Yes My Lord."

[22] Later, the following - page 343, Vol 2, Copy Record:

"Mr Singh: You will see in the records.
Judge: We are going to see that interview before too long aren't we? Because you keep opening it up. Carry on, you should have left the interview alone Mr Singh.

Mr Singh: That was brought in by you My Lord.

Judge: Please don't shout at me Mr Singh. You have enabled prosecutor now to bring rebuttal evidence to prove it wrong. Carry on. You should have left the interview alone."

The record show the appellant counsel re-introduced the caution interview during evidence in chief.

[23] Counsel for the respondent in his submissions cited the case **Rainima v State** [2023] FJCA 190; AAU11.2019 (28 September 2023), a unanimous decision of this Court, in dealing with a complaint of a nature similar to this case.

[24] Counsel submitted that there was prima facie case against the accused at the close of the prosecution case, the State's case at trial stems directly from the accounts of the victim and her mother. The caution interview issues became contentious when the appellant had taken stand as illustrated in pages 342 to 344 of Copy Record. On the evidence led by the prosecution the victim's version at the trial was never shaken by the appellant's cross-examination. The victim maintained that she was raped by the appellant on 8th October 2013, she relayed the incident to her mother who later reported the rape to the Police.

[25] Further, the respondent submitted that the learned trial judge, in pronouncing the Court's judgement stated at the latter part of paragraph 22-see page 105, Vol 2 Copy Record:

"[22]……I am firmly of the belief that sex did occur, that it was Soheb and the Birth Certificate tells me that she was under 13 at the time."

Counsel submits that the three grounds must fail.

Ground 3

[26] The conduct of the trial by the learned trial judge had been challenged and criticized by the appellant, especially in the comments deemed to be of a personal nature made against the defence Counsel in the presence of the assessors and members of the public. The appellant contended that not such behavior fell below the standard required in the criminal trial in the Republic of Fiji under its Constitution and laws. The Court records contains a litany of demeaning remarks about the Defiance case; the appellant's right to deny the

allegations and to present an alternative case. Some examples of such remarks are cited below:

(i) At page 289, Vol II of Records:

*"**Mr Singh: It is the defence case.***

Judge: You don't look at me like that."

(ii) At page 307, Vol II of the Records:

"Judge: Why are you starring at the assessors Mr. Sing, just get on with the question.

Mr Singh: My Lord you were writing your answers.

Judge: And why you were staring down the assessors?

Mr Singh: I'm not staring at them; I'm thinking My Lord. Why would I starred at them they have done no harm to me."

(iii) At Page 311, Vol. II of the Records:

"Judge: I don't care what happened before Mr Justice Sharma. I'm dealing with the evidence today Mr Singh."

Mr Singh: I'm just telling you what happened.

……..

…….

Judge: No, where does it say in the statement? Where about Mr Singh in the statement and stop staring at the assessors please.

Mr Singh: The last paragraph Sir."

(iv) At page 324, Vol II of the Records:

"Judge: Don't shout at me please.

Mr Singh: And I say it very emphatically and clearly not shouting that amended indictment.

Judge: You are shouting don't do it. The amended indictment."

(v) At page 343, Vol II of the Records:

"Judge: Please do not shout at me Mr Singh. You have enabled the prosecutor know to bring rebuttal evidence to prove it wrong. Carry on. And don't stare at me like that its unprofessional.

Mr Singh: I am not starring at you.

Judge: You were.

Mr Singh: And you have made this allegation too many times Your Lordship and you should never do that in front of the assessors.

Judge: Don't you shout at me I will report you to the Chief Registrar. Just behave yourself.

Mr Singh: My Lord with respect those comments should never be made before the assessors.

Judge: Well, you invite them Mr Singh carry on. Carry on with your job please."

(vi) At page 358, Vol II of Records:

Judge: You are saying you did not do that to Police.

Soheb: I have told the Police officers My Lord that I did not do anything.

Judge: <u>Well, that's a lie isn't it. That's not true.</u> (underlining added)

Soheb: No, My Lord.

Judge: Show him the record of the interview please.

Soheb: The Police officers did not ask me any questions

(vii) At page 366, Vol II of the Records:

Mr Singh: This is the evidence. That I hit them both.

Judge: Don't argue with me Mr Singh, that's unprofessional

[27] Counsel for the appellant submitted that in Fiji every person according to the Constitution of Fiji (section 14(2) (a) is to presumed innocent until proven guilty according to law. The Judge's comment about the appellant's evidence removed that presumption and thereafter the trial was a mere rubber stamp on the judge's view that the appellant was a liar and he did not deserve to be heard. He submitted further that the judge erroneously began badgering the appellant with the Record of Interview which the respondent had

undertaken not to use. Badgering is not permitted, where the questioner becomes hostile or ask argumentative questions, my analogy when a judge takes over the role of a "*Prosecutor*" he too is forbidden to ask questions which are hostile or argumentative.

[28] Counsel states that fair trial help establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure fair and just societies and limiting abuse by Government and State authorities. The appellant had a further right to defend himself under section 14(2) (d) and a right to fair trial under section 15(1) of the Constitution of the Republic of Fiji. Counsel submitted that the learned trial judge interfered with the conduct of the trial throughout and denied the appellant a fair. Further, that the judge had a duty to ensure a fair and orderly trial, however, the learned trial judge overstepped the line and impeded Defence Counsel's advocacy functions unfairly. A cornerstone of the criminal justice system is the ability of the Defence Counsel to advocate his or her case effectively. Counsel referred to the United States, where the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. The proper role of trial judge is one of impartiality in demeanour and as well in action: **United States v Frazier [**584 F2d 790,974 (6th Cir. 1978).

[29] Counsel further submitted that a judge's mistreatment of defence counsel or impairment of counsel's ability to represent a client effectively can violate ethical standards as well as provide grounds of reversal. He therefore submitted that this ground of appeal should be upheld and the conviction quashed.

Respondent's submissions on Ground 3

[30] Counsel for the respondent states that the appellant's complaint is the trial judge's conduct during the adducing of evidence, as there were exchanges between the bench and the bar on record. He submitted the appellant Counsel presented the defence version to the assessors in which, a minority opinion of '*not guilty*' went in favour of the appellant. Counsel submitted, that the appellant has not stated how this ground affected the final judgment of the Court. Counsel cited **Peter Michel v The Queen** [2009] UKPC 41 No 0075 of 2008, where it was stated:

"*32. The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it.*

33. None of these, of course, is to say that judges presiding over criminal trials by jury cannot attempt to assist the jury to arrive at the truth. On the contrary, they should. That is part of their task. Judges exist to see that justice is done and justice requires that the guilty be convicted as well as that the innocent go free……"

[31] Counsel submitted that it is unclear from the appeal ground how the exchanges affected the final outcome, as the prosecution had presented evidence accepted only by the majority opinion. Counsel submits that this ground must fail.

Grounds 4 and 5

[32] These are allegations and challenges of miscarriage of justice rooted on the learned trial judges' actions in preventing cross -examination on inconsistencies in evidence at the trial with the earlier trial. The learned trial judge stated that he didn't care what was said before Justice Sharma. Further, on failure to allow cross examination on the fact that the complainant had completely repudiated her police statement not giving any further statement to police and instead relied on a letter she wrote to the DPP office which was not served on the defence until 2018.The learned trial judge prevented cross- examination in regards to prior inconsistent statements. The complainant in this case had repudiated her entire police statement except her signature. Approximately two months after the making of the statement she wrote a letter to the DPP which was undated but received by that office on 16 December 2013.

[33] When the first trial opened before Justice Sharma, the complainant implied that the Police had made up the statements and in cross-examination her evidence was discredited. She informed the Court that her evidence was based on a letter she wrote, the letter was not served on the appellant. Later it was found out to be different from the case the appellant was to answer, as per the disclosures. The respondent applied for the trial to be aborted and justice Sharma granted it. At the second trial, the evidence was led based on the letter

but that letter was not reduced to a Police Statement nor were the Police officers who took the original statement called as witnesses. In short, the complainant was denying the contents of the prior police statement and the trial judge in the second trial disallowed cross-examination and embarked on badgering and ridiculing Defence Counsel for questions relating to the police statement.

Respondent's submission on Grounds 4 and 5

[34] Counsel for the respondent highlighted the learned trial judge's statement at page 104, Vol 1 of Copy Record, at paragraph 18, which reads:

> *"18.] At least 80% of the cross-examination and submissions of the defence were irrelevant to this issue, with so much time being wasted on whether the act was said to have occurred on 1st or 8th October 2013, whether oral evidence was inconsistent with statements made out of Court and who got beaten by the mother, for example.*

[35] **Archbold** [2013] Edition, 8-216 states:

> *"Judges duty to restrain unnecessary cross-examination*
> *A judge should do his utmost to restrain unnecessary cross-examination. Although counsel must not be deterred from doing his duty, counsel for the defence should exercise a proper discretion not to prolong the case unnecessarily. It is not part of his duty to embark on lengthy cross –examination on matters which are not really in issue.*
>
> *It is erroneous for a judge to take the view that cross-examination cannot be stopped merely because there is some tenuous legal reason for it: R v Flynn [19] [72] Crim. LR 428, CA. Counsel should not forget that a trial takes place in public and that therefore names of* ***third parties should be bandied about unless it is necessary*** *for the proper conduct of the trial: ibid. Judges* ***were entitled to impose time limits on cross-examination where it was repetitious and time was being wasted:*** *such a course did not render the trial unfair: R v B (Ejaz)[2006] Crim. LR 54,CA (where transcript showed 24 pages of intense, detailed cross-examination of the complainant, during which time, the judge intervened on 24 occasions with gentle please for counsel to close, his eventual imposition of a 10 minute limit for the cross-examination to conclude, had been justified)."*

[36] The respondent submits that the inconsistencies pursued by the appellant's counsel during cross-examination failed to shake the basic version of prosecution. In **Bharwada Bhoginbhai Hiribhai v State of Gujrat** [1983] AIR 753, 1983 SCR (3) 280, the following pertinent observations were made:

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witness therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen:…(3) 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; (5) 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……"*

[37] Counsel for the respondent also referred to paragraphs 17] to 20] of the Summing-Up by the learned trial judge at pages 109 to 110 of Copy Record, where the assessors were directed on how to approach issue of inconsistencies, as follows:

> *"17] In cross-examination of this witness, Counsel for the defence spent a long time dealing with the inconsistencies he says exist between her evidence and the statement she made to the Police.*
>
> *18] I must now give you legal direction concerning this point.*
>
> *19] When it is revealed that there are inconsistencies between what a witness says in his/her evidence in Court and a statement he/she has made out of Court, then the oral evidence in Court is the definitive evidence.*
>
> *20] The statement itself is not evidence of the truth of its contents, except for those parts of it where she has told you are true. In examining suggested inconsistencies, you will wish to decide, first, whether there is in fact an inconsistency and if you decide that there is one, you will wish to decide whether it is material and relevant or on the other hand insignificant or irrelevant. If there is in fact an inconsistency, it might lead you to conclude that the witness is generally not to be relied on; alternatively, that a part only of her evidence is inaccurate or you may accept the reason she has provided for the inconsistency and consider her to be a reliable witness."*

Respondent submits that the grounds should fail.

Ground 6

[38] The appellant repeats his submissions in relation to ground 3 above, with regards to the appellant's rights contained under the Constitution of the Republic of Fiji. Fair trial include right to be tried by an independent and impartial Court. Counsel submitted that the conduct of the trial fell far short of the notion of fair trial. The right to fair trial is internationally recognised, and is a cornerstone of a just and democratic society. Counsel submits that every person has a right to be tried by an unbiased judge and to be represented by a lawyer who safeguards his interest.

Respondent's Submission to Ground 6

[39] Counsel for the respondent submitted that that the learned trial judge highlighted the burden of proof, standard of proof and presumption of innocence in his summing up at pages 106 to115, Vol 1 of Copy Record. Also, that the appellant was allowed to confront his accuser (the victim) and cross examine each Prosecution witness. Also, the appellant gave evidence for the defence. Further, Counsel submitted that it is unclear what the counsel (appellants) contention is when this ground claims a breach of the appellant's constitutional rights. Respondent submits this ground should fail.

Grounds 7, 9 and 10

[40] The appellant submitted that a miscarriage of justice occurred. The prosecution refused to adduce medical evidence. The complainant was medically examined on 23 October 2013, on the date her mother reported the matter to the Police-see page 269, Vol. II of the Records):

"Ms. Lata: Crystal when was the matter reported to Police?
Crystal: On 23 of October.
Ms. Lata: And it was reported by your mom?
Crystal: Yes.

Ms. Lata: Where were you medically examined?
Crystal: Nadi hospital.
Ms. Lata: On which day.
Crystal: On 23 of October."

[41] Counsel for the appellant contended that the respondent unfairly did not lead evidence from the doctor or tender the medical report at the trial. The doctor was told the complainant was lying in her bed with an Indian boy named Soheb. The doctor found that her hymen was not intact, there was no fresh laceration and she was able to insert one finger without pain. The doctor concluded that she was not a virgin and hymen not intact-see page 178, Vol 1 of Record.

[42] Counsel submitted that the medical examination was consistent with the appellant's evidence in Court that there was no sexual activity on 23 of October 2013. It was wrong for the respondent, as per their guideline to withhold this evidence and also not *make* the doctor available for cross-examination - see page 17 of *"Submissions On Behalf of Appellant."*

Respondents Submissions on Grounds 7, 9 and 10

[43] Respondent submitted that the prosecution case largely stemmed on the direct evidence of the victim, recent complaint and the police investigation officer who tendered the birth certificate. Further, it was submitted that from the body of evidence establishing the prosecution case, the learned trial judge assessed the credibility and reliability of their accounts and found there was *prima facie* evidence subsequently the conviction of the appellant.

[44] That the rape according to the victim's evidence happened on the 8th of October 2013; she was medically examined on 23 of October 2013-see pages 178 to 180, Vol 1 Copy Record). Counsel states that the appellant's Counsel's submission on this ground fails to take into consideration the developments in law on Criminal Procedure in Fiji, as in section 129 of the Criminal Procedure Code (*"No corroboration required in sexual*

offence cases"). He cited **Bharwada Bhoginbhai Hiribhai v State of Gujarat** (supra), also **Tawatatau v State** [2017] FJCA 50; AAU0060, 2013 (26 May 2017), and **R v Brown** [1993] 2 SCR 918.1993 CanLii 114 (SCC).

Respondent submits that this ground must fail.

Ground 11

[45] Counsel for the appellant argued that the learned trial judge wrongly aborted the first trial, on the application of the respondent. This was after the complainant's evidence was discredited. The respondent was duty bound to terminate the proceedings and not to change its case, so as to secure a conviction. This is never a function of the prosecutor. The respondent presented a fresh information at the second trial, alleging different dates of the offence, however, no plea was taken on the fresh information before the assessors. A submission of no case to answer, on grounds no plea was taken and the trial was a nullity, was rejected by the learned trial judge on the fresh information.

Respondents' Case

[46] The respondent did not comment on ground 11 of the appeal. It concluded its submissions stating that taking all the evidence in its totality, the only plausible conclusion one could draw is the guilt of the appellant. The evidence of the victim and the recent complaint were unshaken despite vigorous cross-examination by counsel for the appellant. For that reason, the respondent submits that the appellant's conviction be upheld and the appeal dismissed.

Analysis

[47] Grounds1, 2, and 8 urges that the cautioned interview or caution statement or confession was improperly or erroneously admitted in evidence. Such admission contravenes the rules of fair trial. At the material time the Prosecution was not relying on confession evidence and had not led any evidence on it, presumably due to the fact that the Prosecution and Defence Counsels had earlier agreed that the caution interview is not to be used by the Prosecution, and in turn, the defence would not pursue a challenge on the

caution interview based on the allegations that the accused was assaulted by the police. It is due to such pre-trial arrangement between Counsels that the holding of a *voir dire* was avoided. The admissibility of the caution interview was not determined after a *voir dire.* The learned trial judge stated he was not aware of arrangements made outside his court, which could have influenced his attitude and conduct which the appellant now raises to allege that the trial was not fair. Paragraphs [27] and [28] of the summing-up capture well the source of the complaints in those grounds:

> *"[27] The third and final witness of the prosecution was a Police Officer who was in charge of the investigation at the time. It was he who obtained the original birth certificate of Crystal proving that she has been born on 11 November 2000 and was therefore under 13 in October 2013. He said he was not present when Crystal made her statement, nor was he present when the mother made hers. He confirmed that the accused had never been in trouble with the law before.*
>
> *[28] He talked about having interviewed the accused about the allegations and when asked by me what transpired in the interview he told me that the accused had admitted the offence of rape."*

[48] The learned trial judge's directions in paragraphs [37] and [38] of the summing-up further strengthened the justification for the appellant's grounds of appeal that the trial was not fair. The learned single judge stated:

> *"[37] Now I want to direct you on how you must approach the matter of the interview. Normally when a suspect is interviewed by the Police the record of that interview is used in the subsequent trial. It is evidence that may or may not assist the Prosecution. In this case, for reasons best known to themselves, both the Prosecution and the Defence agreed that it would not be placed before the Court in evidence. However, when the interview becomes an issue in the evidence as it did in this trial when Counsel for the Defence asked the accused about it when he was giving evidence, then it can be 'opened up' 'to a limited degree to show that the accused is not telling the truth. In this case the accused told the Court that he told the Police that he didn't have sex with Crystal. The interview says otherwise so I allowed the Prosecution to show the interview to the accused, and in particular one answer he gave to the Police where he said: 'we had sex on the bed'. This showed that the accused was not telling the truth in his evidence in chief.*

> *[38]* *I direct you that the only use you can make of this answer is to discredit the evidence of the accused:* *that is to say that you may not think his evidence is reliable if he is shown to have lied once. You may not use that evidence to find the accused guilty because the whole of the interview and the manner in which it was made has not been satisfactorily dealt with according to strict rules of evidence relating to interview evidence. If you are to find the accused guilty you must do so solely on the evidence of Crystal and her mother and on nothing else. Apart from using the interview to show that the accused was not telling us the truth in his evidence, you are then to put it out of your minds in your deliberations."* (Underlining added)

[49] It is clear that the prosecution had not intended to produce the appellant's caution interview as part of its case to prove its case. It was the learned trial judge who asked the police officer, in the manner he did, who was the responsible for recording the appellant's caution interview. The police officer responded, in the presence of the assessors that the appellant had admitted the offence of rape. That conduct by the learned trial judge potentially impacted the appellant's fair trial.

[50] It was probably in an attempt to mitigate the damage caused in the defence case by the Police officer's answer that counsel for the appellant asked the police officer, whether the appellant told the police that he had raped the victim, and the appellant had answered in the negative. Then in rebuttal the prosecution had been allowed by the trial judge to confront the appellant with his cautioned interview where his answer to question 54 admitting that they had sex in bed. Then in the summing up the learned judge had directed the assessors to use the answer only to discredit the appellant - see paragraph [48] above.

[51] In his judgment the learned trial judge had dealt with the scenario in paragraphs 19, 20 and 21, as submitted by the appellant - see paragraph [37] above. The trial judge laid the blame on the "opening up" of the cautioned interview on the counsel for the appellant, which is both incorrect and unfair on his part, as it was used to justify allowing the prosecution to actually elicit the self-incriminating answers to question 54 of the cautioned interview under cross-examination of the accused. Meanwhile, the Prosecution continued as if everything was within the acceptable norm and rules of procedure in

criminal trials. It is the trial judge, unwittingly or otherwise, had elicited the appellant's confession in the cautioned interview from the police witness. That is unwise as well as tantamount to taking over the role of counsel, which ought not to be permitted: **Babakobau v State** (supra).

[52] The respondent's submissions on this ground are I paragraphs [23] to [25] above. The critical contention of the respondent's response is that, counsel submitted that there was *prima facie* case established by the prosecution against the accused/appellant at the close of the prosecution case, the state's case at the trial stems directly from the accounts of the victim and her mother. That on the evidence led by the prosecution the victim's version at the trial was never shaken by the appellant's cross-examination that the victim maintained she was raped by the appellant on 8th October 2013, she relayed the incident to her mother who later reported the matter to the Police. In pronouncing the Court's judgment, at paragraph 22 page 105, Vol 2 Copy record, he stated:

> *'I am firmly of the belief that sex did occur, that it was Soheb and the Birth Certificate tells me she was under 13 at the time."*

[53] In my view, the evidence of the victim and her mother do not stand alone, and cannot be considered in isolation from the evidence adduced in whole trial and how the trial was conducted, including the summing-up, judgment and sentence. These three grounds urged by the appellant challenges the admission of what would otherwise be inadmissible evidence under the circumstance.

[54] ***Ground 1****-That the learned trial judge erroneously and contrary to the rules of fair trial introduced confessions into evidence when prosecution was not relying on it and had not lead any evidence on it up to that stage thereby making the trail a nullity, he further refused to instruct assessors to ignore the answers extracted by him from the Police witness thereby allowing prejudicial evidence to be before the assessors.* This ground has merit.

[55] ***Ground 2****-The learned trial judge further after defence attempted to clarify the issue in ground 1 wrongly allowed prosecution to use the evidence stating it was rebuttal evidence, he allowed assessors to hear objections and made rulings without proper considerations thereby causing a miscarriage of justice.* This ground has merit.

[56] ***Ground 8****- The Prosecution unfairly adduced evidence from the record interview when they had indicated that they were not relying on the same making the voir dire unnecessary, failing their duty to be fair.* This ground has merit.

[57] Ground 3 challenges the learned trial judge's conduct of the trial and criticized comments made by the learned trial judge which were in their nature of personal made against the defence counsel. That such behavior fell below the standard required in a criminal trial in the Republic of Fiji under its Constitution. See appellant's submissions at paragraphs [26], [27], [28] and [29] above. See also **Rainima v State** (*supra*)**; Peter Michel v The Queen** [2009] UKPC 41 (Privy Council Appeal No. 0075 of 2008, and **Randall v R** [2002] Crim. App. R, 267,284.

[58] The respondent's reply are contained in paragraphs [30] and [31] above. The respondent questions how this ground affects or influences the final judgment of the Court. This is surprising given the clear provisions of the Constitution of the Republic of Fiji, in particular Chapter 2 on Bill of Rights, and specifically, sections 14 on Rights of Accused Persons and 15 on Access to Courts and Tribunals.

[59] The appellant had also argued that in Fiji every person is presumed to be innocent unless proven guilty-section 14(2) (a) of the Constitution. Paragraph [26] above demonstrate in detail the questions and answers in examination in chief and cross examination. The undermining of defence counsel who has a duty to defend his client to the best of his ability has been undermined. It hinders the effective conduct of the case for the defence, resulting in an unfair trial leading to substantial miscarriage of justice. There is merit in this ground.

[60] With regards to Grounds 4 and 5 the appellant alleges miscarriage of justice in challenging the learned trial judge's actions in preventing cross-examination on inconsistencies in evidence at the trial with the earlier trial involving the same parties under the same set of circumstances under a different judge. The learned trial judge said he did not care about what was said before the judge who presided earlier in this matter. Counsel for the defence was not allowed to cross-examine the complainant on the fact that the complainant had repudiated her police statement and not giving further statement to Police, and instead relied on a letter she wrote to DPP Office which was not served on the defence until 2013-see paragraphs [32] and [33] above.

[61] In responding see paragraphs [34] to [37] above, the respondent alleges that the cross-examinations on inconsistencies were irrelevant echoing the learned trial judge's observations on that point-see page 104, Vol 1 at paragraph 18 Copy Record. That the cross-examination by the counsel for accused failed to shake the basic version of the prosecution. That the assessors were properly directed on how to approach inconsistencies. In all the above, in my view the respondent missed the point, as the ground was targeting the learned trial judge's decision/ruling disallowing counsel for the defence to probe and explore specific areas by cross-examining the complainant. He was prevented/denied. There was a miscarriage of justice. The grounds have merit.

[62] On ground 6, the appellant raises constitutional rights issues of the right to fair trial, which include the right to be tried by an independent and impartial Court. It was submitted that the conduct of the trial was short of fair-see paragraph [38] of judgment, above.

[63] The respondent's arguments are contained in paragraphs [39] above. Respondent alleges that the appellant's contention on this ground is unclear. However, an examination of the appellant's case indicate that it was about the right to fair trial; the right to be tried by an independent tribunal, and the right to be tried in an impartial and independent court. This ground should be construed and read together with all the other grounds, especially grounds 1, 2, 3 and 8. The ground has merit.

[64] Grounds 7, 9 and 10 alleges miscarriage of justice in the Prosecution not adducing the medical evidence. That the medical examination results were consistent with the appellants' evidence- see paragraphs [40] to [42] of judgment, above. The respondent stated that the Prosecution case stem largely on the direct evidence of the victim, recent complaint and the Police investigation. Further, that the body of evidence establishing the Prosecution case, the learned trial judge assessed the credibility and reliability of their accounts and found there was *prima facie* evidence subsequently the conviction of the appellant. The ground has merit.

[65] See paragraph [45] on appellant's case on ground 11: *"That the learned trial judge hearing the first trial erroneously ordered a mistrial when the evidence of the complainant was thoroughly discredited before the assessors thus allowing prosecution to change its case to meet the contents of an undated letter thereby a grave miscarriage of justice.* "

[66] The learned trial judge in the first trial wrongly aborted the first trial allegedly after the complainant's evidence was totally discredited. The respondent presented fresh information at the second trial, alleging different dates of the offence. No plea was taken on the fresh information before the assessors. A submission of no case to answer was taken on ground that no plea was taken and trial was a nullity, was rejected by the learned trial judge on the fresh information. This was unchallenged by the respondent.

[67] The appellant submitted that there was a substantial miscarriage of justice caused to the appellant. That the conviction should be quashed and no new trial ordered, as the appellant has served his sentence and almost nine years have elapsed since the commission of the alleged offence.

[68] The respondent concluded that taking all evidence in its totality, the only plausible conclusion one could draw is the guilt of the appellant. The evidence of the victim and the recent complaint were unshaken despite vigorous cross-examination by counsel for the appellant. For that reason, the respondent submits that the appellant's conviction be upheld and the appeal dismissed.

[69] In reading through the trial record, the grounds of appeal, the conduct of the trial and the submissions of the parties, I am reminded of the sentiments expressed by Hon. Justice William Marshall, Justice of Appeal in **Zafir Tarik Ali & Others v State** FJCA 28; AAU0041.2010 (1 April 2010) on the standards of conduct that promote the rule of law in the investigation, prosecution and trials in criminal cases. The facts of the case are quite different from facts in this case, however, lessons can be learnt from the legal principles applicable to police investigators, prosecutors and judicial officers operating in our legal system and in our courts in the performance of their duties and role. In paragraph 3 of the judgment, at page 2, His Lordship, with respect of safeguarding the rule of law in criminal cases, stated:

> *"3. Now three groups of citizens who have greatest burden applying the safeguards and maintaining the rule of law in criminal cases are the police who investigate crime, the prosecution service under the Director of Public Prosecution who have the duty of prosecuting criminal cases in courts of Fiji, and finally, the judiciary particularly in the High Court. The High Court judges who are assisted on the facts by the opinion of the assessors , must apply the rules relating to procedure to be followed at criminal trials with integrity and meticulously and make the rules necessary by applying principles of law without fear or favour in respect of either prosecutor or counsel for the defence. They have the burden to ensuring a fair trial in accordance with the rule of law."*(Underlining added)

[70] His Lordship further stated at page 4 with respect to police investigators, prosecutors and judges:

> *"11... [T]he Police investigator serves the rule of law and the people of Fiji if he or she investigates thoroughly but nonetheless fairly and correctly in respect of gathering evidence, in respect of interrogating suspects and in respect of charging accused persons.*

> *12. The Public prosecutor serves the rule of law and the people of Fiji, if he or she observes the rules and does not strive to obtain convictions on a number of unfair and unlawful practices such as trying to get new and inconsistent evidence admitted into evidence against the accused. If the prosecutor does that without giving notice to the Court and the defence counsel who are ambushed and taken by surprise, it is worse. If the Court and the defence are intentionally mislead that makes it much worse.*
>
> *13. The judges of the High Court serves the rule of law and the people of Fiji if aware of all the rules of law he or she applies them and achieves a fair trial.*(Underlining added).

[71] According to the facts the complainant is now married with a child, and according to counsel for the appellant, the appellant had served his sentence and has moved on in life also, as after almost nine years have elapsed since the commission of the alleged offence.

[72] Having considered all the circumstances of this case, including the totality of the evidence, the grounds of appeal, the submissions of the parties (both written and oral) the legal authorities and relevant statutes, I hold that the trial conducted in this case was not fair. It did not meet the requirements of the law and the Constitution of the Republic of Fiji. There has been a substantial miscarriage of justice as a result.

The appeal is allowed. In accordance with section 23 (2) (a) of the Court of Appeal Act the appellant's conviction is quashed. The appellant is acquitted. .

Winter, JA

[73] I agree with the reasons and the conclusions arrived at by Qetaki, JA

Orders of Court:

1. *Appeal against conviction allowed.*

2. *Appellant is acquitted*

Hon. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Gerard Winter
JUSTICE OF APPEAL