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

CRIMINAL APPEAL NO.AAU 0055 of 2013
[High Court Criminal Case No. HAC 134 of 2012)

BETWEEN	:	**JOSUA WALILI** **ILIANI SUKALOA** **SAILOSI LAWALIGANA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra, JA** **Prematilaka, JA** **Perera, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellants** **Mr. S. Vodokisolomone for the Respondent**
Date of Hearing	:	**05 May 2017**
Date of Judgment	:	**26 May 2017**

JUDGMENT

Chandra, JA

[1] I agree with the reasons and conclusions of Prematilaka JA.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellants on three separate counts under section 207 (1) and [2] (a) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed between 01 January and 31 January 2012. The Information dated 26 April 2012 describes the particulars of the count as the Appellants having had carnal knowledge of P (name withheld) without her consent. The first count against the 01st Appellant was a representative count.

[3] After trial, the two lady assessors expressed a unanimous opinion that the Appellants were guilty of the said counts. The Learned High Court Judge on 03 May 2013, having concurred with their opinion, convicted the Appellants and on 09 May 2013 imposed sentences of 12 years of imprisonment with the eligibility period of 09 years for parole on the 01st Appellant, 11 years of imprisonment with the eligibility period of 08 years for parole on the 02nd Appellant and 11 years of imprisonment with the eligibility period of 08 years for parole on the 03rd Appellant.

Preliminary observations

[4] The 01st and 03rd Appellants had invoked the appellate jurisdiction of the Court of Appeal against the said conviction and sentence by way of two letters dated 28 May 2013 addressed to the Court of Appeal Registry. An amended petition of appeal had been filed on behalf of all three Appellants by the Legal Aid Commission on 31 July 2014. Written submissions on behalf the Appellants and the Respondent had been tendered on all grounds of appeal. Chandra RJA on 02 March 2016 had allowed leave to appeal in respect of a single ground of appeal only.

[5] Prior to the hearing of the appeal before the full Court, the counsel for the Appellants had informed the Hon. President of the Court of Appeal that he would rely on the submissions filed at the leave to appeal stage and the Respondent through counsel had tendered fresh written submissions. At the hearing of the appeal the counsel for the Appellants sought to have the application for leave to appeal determined before the Court duly constituted to hear and determine the appeal under section 35(3) of the

Court of Appeal Act relating to the second ground of appeal where leave was initially refused. The court allowed the Respondent to file additional written submissions on that application and also on the question whether having regard to the totality of evidence the verdict is reasonable or could be supported. The State accordingly tendered supplementary written submissions on 15 May 2017.

[6] In the supplementary written submissions filed, the Respondent had not objected to this Court considering the second ground of appeal but had made submissions only on the merits of it. Having myself examined the evidence of the case and considering the fact that at the leave stage Chandra RJA had not had the benefit of the entire case record and therefore an opportunity of perusing the entirety of evidence, I believe that in the interest of justice this Court should allow the Appellant's application under section 35(3) of the Court of Appeal Act and go onto consider the second ground of appeal as well.

Grounds of Appeal

[7] Therefore, the grounds of appeal that would be considered by this Court are as follows.

Ground 1

'The Learned Trial Judge acted erred in law when he unfairly dismissed the Appellants' counsel's application to summon the witnesses that the Prosecution decided not to call on the day of the trial. These witnesses were crucial in determining the credibility of the complainant. In doing so, it was prejudicial to the defence resulting in a substantial miscarriage of justice."

Ground 2

'The learned Trial Judge erred in law and in fact when he failed to consider in his judgment the inconsistent evidence of the complainant and the significant material medical evidence in determining any forced sexual intercourse resulting in a substantial miscarriage of justice.'

Summary of evidence

[8] The complainant, then an unmarried nearly 18 year old, had visited her aunt in the eve of the New Year and a few days later, while the rest of the inmates were asleep, come out of the house around midnight to answer a call of nature. She had seen a man standing short distance away and recognised him to be the 01st Appellant. She had then answered the call of nature and started washing her legs when the 01st Appellant had come, grabbed her from behind, and dragged her to the house nearby where he had removed her garments and inserted his penis into her vagina. After he got up, the 02nd Appellant had come and asked him to move away and inserted his penis into her vagina. She had claimed not to have reported the incident to anybody because she was 'afraid'.

[9] On another day, she had been swimming with her cousins in the sea and when on her way home with one of them called Teresia, the 01st Appellant, hiding near a mangrove tree, had pulled her by the hand, removed her garments, made her lean on a tree, and inserted his penis into her vagina. Once again, she had not reported the incident to anybody because he was 'afraid'.

[10] Yet on another day she had gone to the 03rd Appellant's house with her cousin brother called Ramasua. The 03rd Appellant had sent her cousin away to pick up a multi-charger to a house nearby and called her inside. When she had gone and sat, the 03rd Appellant had undressed her and inserted his penis into her vagina. After the cousin brother came back, she had gone home but not reported the incident to anyone as she was 'afraid and ashamed'. Ramasua, though being witness No.5 in the list of witnesses, was not called to give evidence by the prosecution. When the defense applied to call the witnesses who were not going to be called by the prosecution the trial Judge refused the application.

[11] These incidents had started coming to light as a result of the pastor having heard of some boys in the village misbehaving and questioned the complainant but she had not disclosed anything to the pastor as well. Later, when her aunt whom she was living with at the time of the incident confronted her she had told her what had happened. Under-cross examination it was revealed that what she had told the police was that she had first told or confessed to the Pastor and the Pastor had told his wife who apparently had conveyed the same to the complainant's aunt. However, it is not clear from evidence how the matter finally came to light.

[12] In any event neither the Pastor, nor his wife, neither the complainant's aunt was called by the prosecution to give evidence at the trial.

[13] No other lay witnesses were called by the prosecution but only the evidence of police officers was led. The counsel for the Appellants had indicated to court at the pre-trial stage that they admit having had sexual intercourse with the complainant but with her consent and therefore *voir dire* inquiry was not necessary.

[14] The charge statements and caution interviews of all the appellants were marked through the police officers at the trial. According to these statements all Appellants admit having engaged in acts of sexual intercourse with the complainant but denied lack of consent.

[15] The complainant had been examined on 23 February 2013 and medical evidence had revealed that her hymen had not been intact and she had had vaginal penetration. She had been sexually active. However, doctor has not been able to ascertain as to when the penetration had occurred. In any event medical evidence is not that important in this case as the Appellants admit having had sexual intercourse with the complainant who had not said that the alleged incidents were her first experiences of sexual intercourse.

Section 231 of Criminal Procedure Act not complied with.

[16] There is nothing to indicate that at the end of the prosecution case the trial Judge had considered whether there was evidence that the Appellants had committed the offence they were charged with in terms of section 231 (2) of the Criminal Procedure Act but had only explained ramifications of giving evidence. I shall deal with the matter in greater detail later. However, the 01st and 02nd Appellants had given evidence under oath while the 03rd Appellant had remained silent. The 01st and 02nd Appellants had once again admitted having had sexual intercourse but with the consent of the complainant.

[17] I shall now deal with the grounds of appeal.

> **Ground 1 -** 'The Learned Trial Judge acted erred in law when he unfairly dismissed the Appellants' counsel's application to summon the witnesses that the Prosecution decided not to call on the day of the trial. These witnesses were crucial in determining the credibility of the complainant. In doing so, it was prejudicial to the defence resulting in a substantial miscarriage of justice."

[18] The contention of the Appellants is that they had been deprived of a fair trial by the trial Judge's decision on 01 March 2016 to refuse their application to call the witnesses who were not going to be called by the prosecution on the basis that the defense counsel had been lackadaisical and the court had no time to run over to another day. I think there is a fair measure of credibility to this complaint. The trial spilled over into the following day as well and therefore there was no unavoidable reason as not to allow the defense application. There were 10 witnesses listed including 04 police witnesses in the List of Witnesses and the prosecution had informed court and the defense that it would call only 07 of them. Therefore, the defense could not have predicted which 07 witnesses would be called out of 10 witnesses. The prosecution had indicated at the beginning of the trial that it was trying to locate the complainant's aunt (W2) and after the evidence of the doctor and the complainant, the prosecution had informed that witness No. 5 was also not available

with an indication that he had changed his statement. It is at that stage that the defense probably felt that the prosecution was not going to call some of the listed witnesses whose evidence might also be helpful to the defense. Therefore, the defense wanted to call them.

[19] Section 14(2)(1) of the Constitution states *'Every person charged with an offence has the right to call witnesses and challenge the evidence presented against him or her'* while section 15(1) states that *'Every person charged with an offence has the right to a fair trial before a Court of Law'.* Section 233(3) of the Criminal Procedure Act 2009 provides *'No accused person shall be entitled to any adjournment to secure the attendance of any witnesses unless it is shown that he or she could not by reasonable diligence have taken steps to obtain the presence of the witness.'*

[20] In my view, whenever section 233(3) is applied in any given situation, it must be done in a way not to offend the letter and spirit of those constitutional provisions but in harmony with them, for they are designed to secure due process of law which is one of the greatest beacon lights of any democratic society. I do not think that the defense could be accused of failure to exercise due diligence in this instance. Therefore, the trial Judge should not have refused the Appellants' application to call witnesses.

[21] However, I propose to examine whether the trial Judge's refusal has resulted in a substantial miscarriage of justice as argued by the Appellants. When the Court inquired at the hearing as to which witness or witnesses the defense wanted to call, the counsel for the Appellant could specifically identify only witness No. 5 who is Ramasima Tabualailai. Ramasima is the complaint's cousin brother who had accompanied her to the 03rd Appellant's house where she was allegedly raped. I have taken the liberty to examine Ramasima's statement to see what type of prejudice had been caused to the 03rd Appellant by the refusal of the trial Judge not allowing the defense to call this witness on the following day.

[22] Ramasima's evidence taken at its best would show that the time gap between his leaving the 03rd Appellant's house to go to the 02nd Appellant's house about 30 steps away and coming back after picking up a disk, was not adequate for the 03rd Appellant to have raped the complainant. This would not be much help to the 03rd Appellant as his defense is that of consent. If he had denied the act of sexual intercourse altogether, Ramasima's evidence would have been useful to cast doubt on the complaint's evidence as far as the act of sexual intercourse is concerned.

[23] Since the Appellants' counsel was unable to indicate even at the hearing, of any other witnesses that he wanted to call, I am not a in a position to examine his complaint with regard to such other witnesses. Assuming that those were the other witnesses listed in the list of witnesses, I do not find that their evidence would help the Appellants a great deal on the issue of consent except on matters that may go into her overall credibility. For example Teresia (W3) had told the police that when she and the complainant went to the sea the 01st Appellant was not there and therefore, her evidence has little to do with the aspect of consent. The complainant's aunt's and pastor's statements only speak as to how the matter had come to be finally revealed by the complainant. Therefore, in my view, though I find merit in the Appellants' complaint on law, I am unable to hold that the Learned Judge's decision in this instance had caused substantial miscarriage of justice. I would, therefore, apply the proviso to section 23 (1) of the Court of Appeal Act regarding the first ground of appeal

> **Ground 2 -** 'The learned Trial Judge erred in law and in fact when he failed to consider in his judgment the inconsistent evidence of the complainant and the significant material medical evidence in determining any forced sexual intercourse resulting in a substantial miscarriage of justice.'

[24] On a careful analysis of the complainant's evidence the following matters begin to emerge which, to say the least, are disturbing as far as the conviction is concerned.

(i) The complainant's behavior outside the house at midnight is not that of a reasonable person of her age who was 'afraid' or 'ashamed'. She had not awakened anyone at home to say that she was going out. She knew that the 01st and 02nd Appellants along with several other youths were having drinks at a house in front at or about the same time. She saw the 01st Appellant under a tree but did not withdraw from the scene but still answered the call of nature outside the house without going to the toilet. Would a girl of her age do that in view of a young male? Why did she deliberately avoid the toilet? Did she go out secretly knowing that the 01st and 02nd Appellants were waiting outside? Was the urge to answer a call of nature a mere ruse?

(ii) According to the complainant, she could not scream as the 01st Appellant had grabbed her by the waist from behind and gagged her with a cloth. Under-cross examination she had admitted that she would shout if someone surprises her by grabbing from behind. But once she came inside the house also she did not complain to her aunt, aunt's husband or the other couple living in the same house, that she had been raped. The 01st Appellant had not held out any threat or used force for her not to do so. There was no other reason for her to be afraid either. Is her behavior not more compatible with that of a consenting party?

(iii) The 02nd Appellant is not even alleged by the complainant to have obstructed her from alerting the inmates in the house of her plight. Neither has he threatened or used force on her before or after taking his turn to have sexual intercourse with her. She had not complained of the 02nd Appellant also to anyone.

(iv) When the second incident happened in the sea, the complainant's cousin, Teresia and several other cousins had been in the vicinity swimming but none of them had heard her raising an alarm or seen her being restrained by the 01st Appellant. Again, strangely the complainant had not complained to anyone.

Was she once again a willing participant in engaging in an act of sexual intercourse?

(v) On the third occasion, the complainant had willingly gone inside the 03rd Appellant's house at his first invitation when her cousin Ramasua went away to a house nearby. The complainant had contradicted herself as to whether the door was open or not during the time of sexual intercourse. True to her behavior on previous instances, she did not complain to anyone. Did she consent to make use of the opportunity that arose by the absence of her cousin Ramasua to engage in sexual intercourse with the 03rd Appellant?

(vi) On all three occasions, according to her, the Appellants had 'covered her mouth' and had sex for '05 minutes'. This smacks of rather strange consistency regarding all three instances of alleged rape.

(vii) She on her own never complained to the police of any of the three instances or against the three Appellants as having raped her. Her first complaint had been recorded by the police in February 2012.

(viii) On being specifically questioned, she had refused to divulge the alleged acts of rape even to the Pastor. She had told her aunt also only when questioned. Under cross- examination, however, the complainant had said that the Pastor had heard it from others in the village and when he asked her she had told him. When it was pointed out to her that she had told the police that she had confessed to the Pastor, she remained silent. Her inconsistency and contradiction is too glaring to ignore.

(ix) The Complainant had known the 01st and 02nd Appellants before because she used to visit her uncle's place previously.

(x) There is no evidence of the Appellants having threatened or forced her to keep their encounters secret. Even when the first opportunity presented itself she had declined to reveal. Why?

[25] The defense had suggested to the complainant that all three acts of sexual intercourse had taken place with her consent and they have been consistent from the beginning on this.

[26] According to the Medical Examination Form the complainant had told that the acts of sexual intercourse had taken place on 07, 14 and 18 January 2012. She had not divulged any names of the perpetrators of the alleged rape to the doctor but had only identified them as three youths. Though not legally obliged to do so, it looks as if she had been reluctant to name the Appellants?

[27] The defense also did not challenge the charge interviews and caution interviews of the Appellants tendered by the prosecution.

[28] The 01st Appellant had told in his caution interview that he had seen the complainant going towards the toilet around 12 midnight on 07 January and he had started a conversation with her, solicited sex and she had agreed. She had not resisted in any way and he had denied gagging her with a cloth. According to him, she had removed her panty. After he had finished the act of sexual intercourse, the 02nd Appellant had come and taken his turn. According to the 01st Appellant, the 02nd Appellant had seen him having sex with the complainant. With regard to the second incident, the 01st Appellant had admitted having sexual intercourse with the complainant in a mangrove swamp on 14 January but again only with her consent. He had denied the allegation of using force on the complainant. Further he had said that when he was engaged in the act of sexual intercourse with the complainant, he had felt that she had been engaged in sex before.

[29] The 02nd Appellant in his caution interview had said that the complainant was related to him from his father's side and she was his cousin sister. According to him, around 1.00 a.m. he had seen the 01st Appellant having sexual intercourse with the complainant in front of the house. After the 01st Appellant had left, while the complainant was still lying on the ground, he had approached, caressed her breasts and requested to have sex with her and she had agreed. He had said that she loved it when they were having sex.

[30] According to the 03rd Appellant's caution interview, he had known the complainant for about 03 months and she used to come to his place to borrow movie CDs. On 18 January also she had come there in the afternoon and asked for a movie CD and he had asked politely whether she agreed to have sex with him and she had consented. He had denied gagging the complainant or having had sexual intercourse by force.

[31] Section 231 of the Criminal Procedure Act 2009 requires the court to consider two important issues when the evidence of the witnesses for the prosecution has been concluded. If the court considers that there is no evidence that the accused person committed the offence, it shall record a finding of not guilty. If it considers that there is evidence that the accused person committed the offence, then it shall inform the rights available under section 213 (2) (a), (b) and (d) to the accused.

[32] Therefore, at the close of the prosecution case the trial Judge is bound to give his mind to this vital issue as to whether there is evidence that the accused person committed the offence. The test to be applied at this threshold is whether there is some relevant and admissible evidence in respect of each element that must be proved before the accused could be convicted of the offence alleged against him in the Information [see **State v Anthony Frederick Stephens** (1998) 44 FLR 165]. It has been also formulated to read as whether there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offences i.e. whether there is a *prima facie* case. Matters of the credibility and weight of the evidence are not within the province of the judge at this stage of the trial (see **Sisa Kalisoqo v State** Criminal Appeal No. AAU 0052 of 1984 and **State v. Mosese Tuisawau** Criminal Appeal No. AAU 0014 of 1990). These pronouncements have been adopted in a large number of judicial decisions across a long time span and remain valid to date even under section 231(1) and section 231 (2) of the Criminal Procedure Act 2009. The fact that there is no application by the defense of no case to answer under section 231(1) does not absolve the trial judge from applying the threshold test *ex mero motu* and come to a decision before acting under section 213 (1) or (2) as the case may be. Similarly, the trial Judge cannot escape from this obligation even when, for reasons best known to them, the accused on their own elect to give evidence. Calling for the defense at the close of the prosecution case is not automatic. It is not a mechanical decision either. The judicial mind of the trial judge

should be directed on the lines formulated in the aforesaid decisions before calling for the defense.

[33] Unfortunately, there is nothing on record to indicate that the Learned High Court Judge in this instance has given his mind to this vital aspect of the case against the Appellants. The record only states that the ramifications of giving evidence have been explained. This is a serious procedural irregularity that should be avoided when conducting trials because it is a vital step of a fair trial guaranteed by the Constitution.

[34] In my view, given the fact that the caution interviews were tendered by the prosecution as part of proving its case *vis-à-vis* the elements of rape namely the acts of sexual intercourse and consent, the trial Judge, irrespective of his decision, should not have avoided considering as to whether there was evidence or not that the Appellants committed the offence by applying the aforesaid test before proceeding further, for *inter alia* the statements made by the Appellants to the police and produced by the prosecution at the trial completely cut across the complainant's evidence on the element of consent.

[35] Nevertheless, the fact remains that the 01st and 2nd Appellants had given evidence under oath.

[36] The 01st Appellant had stated that when he was having drinks he saw the complainant coming out of her house, he walked up to her and asked whether she agreed to have sex with him. She had agreed and followed him to a house nearby where she had agreed once more to have sex. She had removed her cloths. Then they had engaged in sexual intercourse. On the second occasion too, when the complainant was coming back from a bath he had coaxed the complainant into have sex with him and they had had sexual intercourse standing up. After 03 weeks, having been informed by one Torika's husband, the head of the clan had summoned a meeting where the Appellants and the complainant had been present. At that meeting the complainant had said that those men had raped her. Then, the clan had called the police and the Appellants had been taken to the police station. The 01st Appellant was emphatic that he had sexual intercourse on both occasions with the complainant with her consent. His testimony had stood cross-examination and remained unscathed.

[37] The 02nd Appellant also had given evidence under oath. He too had been drinking at the 03rd Appellant's house in front of the complainant's house. He had seen her outside her house and then, her going around and coming back. He had wondered what she was up to and gone towards the house nearby to find out and seen her with a man whom he identified as the 01st Appellant. After he left, the 02nd Appellant had solicited sex from the complainant and she had agreed. He had described the complainant as one usually going with men. His evidence too had withstood the scrutiny of cross-examination and come out undiminished.

[38] The 03rd Appellant remained silent.

[39] Keeping the above matters in mind, I shall now examine the summing up because at the end of it the two assessors had expressed a unanimous opinion that the Appellants were guilty of the offences they were charged with. The following decisions shed some light as to my task.

[40] The Supreme Court in **Senijieli Boila v The State** (Criminal Appeal No. CAV005 of 2006S: 25th February 2008) observed that

> *'The adequacy of a particular direction will necessarily depend on the circumstances of the case.'*

[41] Similarly, in **Khan v State** Petition for Special Leave to Appeal No. CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] the Supreme Court said

> *' There is no incantation which must be read here. The required guidance need not be formulaic.'*

[42] The Court of Appeal said in **Tamaibeka v State** Criminal Appeal No. AAU 0015 of 1997: 8 January 1999 [1999 FJCA 1]

> *'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced.. '*

[43] In **R v Lawrence** [1982] AC 510, 519 Lord Hailsham of St. Marylebone L C said:

> *'A direction to a jury should be custom built to make the jury understand their task in relation to a particular case..... But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.'*(emphasis added)

[44] In **R v. Fotu** [1995] 3 NZLR 129 Cooke P. said as follows

> *' A Judge is entitled to indicate his own views of the evidence, provided that as a whole the summing up is a fairly balanced and fair presentation of the case to the jury (Broadhurst v. R [1964] AC 441; R v Ryan [1973] 2 NZLR 611)'*

[45] Lord Goddard CJ in **R v Clayton** (1948) 33 Cr App R 22 had this to say.

> *"The duty of a judge in any criminal trial .... is adequately and properly performed .... if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence ...."*

[46] **R v Wilkes and Briant** [1965] VR 475, 479, Smith J said

> *'Important amongst the necessary safeguards is the established rule that it is the judge's duty to put the defence fairly to the jury. That rule cannot, save in quite special circumstances, be departed from, without serious risk of a miscarriage of justice."*

[47] In **R v Ryan** [1973] 2 NZLR 611 Richmond J in the Court of Appeal of New Zealand said

> *"There are cases where, in the particular circumstances, it has been held sufficient for a judge to leave the matter to the jury simply on the basis of the evidence they have heard and the addresses of counsel.... On the other hand there have been cases in which the summing up was held inadequate because it emphasised matters adverse to the accused but failed adequately to convey to the jury the answers made by the accused..... In some cases it may be sufficient for the judge to refer in the most general terms to the issue raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence.* (emphasis added)

[48] In **R v Cohen and Bateman** 2 Cr. App. R, 197 at p. 208 Channell J said

> *'In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law..... It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions.'* (emphasis added)

[49] In **Vilikesa Volau v State** Criminal Appeal No. AAU 0011 of 2013: 26 May 2017 the Court of Appeal said what the court of appeal would look for is whether as a whole the summing up is a fairly balanced and fair presentation of the case to the assessors.

[50] Having examined the summing up carefully, while I am satisfied that the trial judge has dealt with the relevant law applicable and the evidence led at the trial in sufficient detail, I cannot help but feel that it lacks adequate directions on what inferences the assessors may have drawn, if they so wished, from the totality of the facts on the issue of consent. In the light of matters highlighted above, I firmly believe that the assessors cannot be said to have received required assistance from the trial Judge in arriving at a decision on the matter of consent which the Judge himself describes as the 'only issue' in the case. Therefore, the summing up should have been more focused on the aspect of consent. To me, it is far too formulaic, stereo-type and conventional. It is not robust

and custom built to attract the focused attention of assessors to the crucial issue of consent. Therefore, I conclude that the trial Judge has failed in his duty to adequately evaluate the evidence, resulting in a verdict which was unsafe, unsatisfactory and unsupported by the evidence as a whole. I cannot say that as a whole the summing up is a fairly balanced and fair presentation of the case to the assessors.

[51] However, despite the trial Judge having failed to address the assessors on the aforesaid vital matters in the summing up, he could still have properly directed himself, had he given his mind to those aspects and dealt with them in the judgment. I shall now examine that aspect of the judgment. The only relevant paragraph of the judgment delivered on 03 May 2012 as follows.

> *' In the unanimous opinion of two assessors, you have each been found guilty of these offences. That being a joint opinion on the credibility of the complainant it is an opinion which I would not wish to interfere with. Having addressed myself on my own Summing Up, I find each of you guilty of the offence as charged and convict you accordingly.'*

[52] It appears that the Judgment is nothing more than a mere rubber stamp of the assessors' opinion. No accused could be convicted on the opinion of the assessors alone in Fiji. The following decisions provide useful guidance in this regard.

[53] In **Prasad v The Queen** [1981] 1 A. E. R 319 the Privy Council said

> *'... in Fiji, the mode of trial is not the same as in England or Scotland. There is no jury; the trial is before a judge and assessors.... The judge sums up to them; ....and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong.'*

[54] In **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30] His Lordship the Chief Justice said

> *'In Fiji the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.'*

[55] **Ram v. State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] the Supreme Court held that

> *'The system of trial by a judge and assessors differs in one important aspect from trial by jury, as unlike under the jury system, even the unanimous opinion of the assessors does not bind the trial judge, who is free in appropriate cases, to differ and pronounce his own verdict.'*

[56] Therefore, the trial Judge cannot under any circumstances abdicate or surrender to the assessors the responsibility cast on him by section 237 of the Criminal Procedure Decree of 2009. It is in that context that His Lordship the Chief Justice said in ***Noa Maya***

' ..... it is highly desirable for a judge to write a short judgment explaining the basis for his concurrence or disagreement with the opinions of the assessors.'

[57] Though in ***Ram*** the Supreme Court seems to suggest that a trial Judge should independently assess the evidence for him to satisfy that the ultimate verdict is supported by evidence and is not perverse, in **Kaiyum v State** Criminal Appeal No. AAU 0071/2012: 14 March 2014 [2014 FJCA 35] the Court of Appeal held that those comments in ***Ram*** were *obiter dicta* and said as follows.

> *'But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" (**State v Miller** (unreported CAV 8 of 2009; 15 April 2011, **Mohammed v State** (unreported CAV 2 of 2013; 27 February 2014)'*

[58] In my view, the judgment under section 237 of the Criminal Procedure Act 2009, be it short or otherwise, should reflect the basis why the Judge concurs with the opinion of the assessors. Depending on the facts of the case, it should also have a reasonable discussion at least on the main issues in the case, for example 'consent' as in the instant case. Overall the appellate court should be comfortable that the final verdict is not that of the assessors but of the judge. All stake holders including the public should be satisfied that the final decision maker is the judge and not the assessors. I regret to

state that that I have this uneasy feeling that the trial Judge has simply allowed himself to be carried away by the assessors' opinion in this case.

[59] Therefore, unfortunately in this instance the Learned High Court Judge does not seem to have given his independent mind to the most crucial issue of consent. He had simply 'not wished' to interfere with the assessor's opinion on the credibility of the complainant. I am of the firm view that had he considered and directed himself of the unsatisfactory features of the prosecution case along with the consistent stand of the Appellants highlighted above, he may not have concurred with the assessors' opinion.

[60] Nevertheless, this Court in exercising appellate jurisdiction under section 23(1) of the Court of Appeal Act cannot escape from the duty, responsibility and obligation to consider the question whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or on a wrong decision of any question of law or any other ground that there was a miscarriage of justice. In this exercise this Court would independently assesses the evidence by putting itself in the shoes of the trial court.

[61] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him (vide ***Ram*** and ***Kaiyum***)

[62] In ***Ram*** the Supreme Court further held that

> *'In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case*
>
> *'At the end of the day, the foundations for the conviction were found to be insecure and insufficient.'*

[63] I have also analysed the evidence of the prosecution carefully and I find that the complainant's testimony has failed the test of probability, consistency, want of contradictions and promptness. Thus, to me the prosecution has failed to prove the case against the Appellants beyond reasonable doubt.

[64] I have already examined, analysed, evaluated and assessed the totality of evidence with a fine-tooth comb and cannot help but come to the irresistible and inescapable conclusion that the verdict of guilty against all the Appellants is unreasonable or cannot be supported having regard to the evidence. I must confess that I do entertain a 'lurking doubt' about the safety of the conviction. It is clear that the foundations for the conviction are insecure and clearly insufficient. Therefore, I think it is unsafe and dangerous to permit the convictions of the Appellants to stand.

[65] As English jurist **William Blackstone** in his seminal work, ***Commentaries on the Laws of England***, published in the 1760s said "*It is better that ten guilty persons escape than that one innocent suffer*".

[66] Therefore, I allow the appeal against the conviction of all three Appellants. I also quash the conviction and direct that a judgment and a verdict of acquittal be entered.

Perera, JA

[67] I have read in draft the judgment of Prematilaka JA and I agree with His Lordship's reasons and conclusion.

The Orders of the Court are:

1. *Appeal is allowed.*
2. *Convictions against all three Appellants are quashed.*
3. *All three Appellants are acquitted.*

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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL