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

CRIMINAL APPEAL NO.AAU 128 of 2014
[In the High Court at Lautoka Case No. HAC 22 of 2010]

BETWEEN	:	**JACK ANTHONY FRASER**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Lecamwasam, JA** **Prematilaka, JA** **Bandara, JA**
Counsel	:	**Appellant in person**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**12 April 2021**
Date of Judgment	:	**05 May 2021**

JUDGMENT

Lecamwasam, JA

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

Prematilaka, JA

[2] The appellant had been indicted in the High Court at Lautoka with a single count of robbery with violence contrary to section 293(1)(b) of the Penal Code committed at Lautoka, in the Western Division on 26 October 2009.

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty. The learned trial judge had disagreed with the unanimous

opinion of the assessors in his judgment, convicted the appellant as charged and sentenced him on 03 October 2014 to imprisonment of 08 years and 06 months with a non-parole period of 07 years.

[4] The appellant had appealed in a timely manner against conviction and sentence. The counsel for the appellant had urged 05 grounds of appeal before the single Judge who had refused leave to appeal in respect of all of them. The appellant had renewed some of the grounds against conviction where leave was refused by the single Judge and included additional grounds of appeal totaling twelve. However, in his further amended grounds of appeal filed on 08 April 2019 he had only pursued 05 grounds of appeal of which 03 were totally fresh grounds against conviction. The other two grounds were urged before the single Judge but leave to appeal was refused and they are now the 01st and 02nd grounds respectively as given below.

[5] Accordingly, the following grounds of appeal were considered at the full court hearing:

> *'**Ground 1:***
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> *That as a result of failing the matters enumerated in the trial hearing. The trial judge erred first by failing to provide sufficient reasons for differing from the reasons of the assessors, second by failing to independently assess the evidence a failure to do so meant that the judge could not make an informed judgment on whether the assessors had made a reasonable decision not to convict.*
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> ***Ground 2:***
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> *The learned judge erred in law in not adequately directing/misdirecting himself to the significance of prosecution witnesses conflicting evidence during trial.*
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> ***Ground 3:***
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> *The learned judge erred in law when he failed to direct the assessors on the third and last element of the offence, that is "at the time of or immediately before or immediately after such robbery uses or threaten to use of any personal violence," thus causing substantial miscarriage of justice.*
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> ***Ground 4:***
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> *The learned judge erred in law and fact when he had allowed crucial evidence by the State during trial thus disregarding section 134 (2)(a)(c), 4(c) and 290 (1)(b)(c)(d) of the Criminal Procedure Decree.*

Ground 5:

The appellant wishes to raise with the honourable court the lack of competency by the appellant's legal aid lawyer during trial.'

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) used in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Factual matrix in the case

[7] Ronika Kiran was residing with her son and her de facto husband Imran Ali alias Vicky at Lovu, Lautoka. On 26 October 2009 at about 9.30 p.m. the appellant, identified by Ronika Kiran as Jack Fraser and two others had come to her house. At that time her son was doing his homework and her husband was not at home. First she had seen the appellant talking to somebody over the phone. After that three people including the appellant had entered the house through the main door which was opened at that time. The appellant had gone inside the house to use the wash room. He had come back from the wash room and gone to the kitchen and picked a chopper and come close to her. She had known the appellant for about 2-3 years before the incident as he had been a good friend of her husband. She also had known one of the others as Samuel Singh but not known the third one. When the appellant came close to her, the other two had closed the door and drawn all the curtains preventing anybody from seeing the inside of the house. The appellant had then kept the chopper on her neck and threatened her to give what they wanted. They had taken her to the room and lowered all the curtains. The appellant had punched her head and demanded

all their valuables. As a result of the assault blood had started coming out from her forehead and the nose. Thereafter she had been dragged to the other room by her armpit by the appellant and demanded valuables. The appellant had been seated in front of her with the chopper while the other two were searching the house for valuables. The appellant had started to punch her after seeing Samuel Singh finding some jewellery. At this time, hearing the sound of an oncoming vehicle Samuel Singh had closed her mouth and tied her hands with cello tape. Her son had been pushed in to the washroom.

[8] Ronika Kiran had been ordered to call her husband inside but she could not do so as the cello tape was around her mouth. She had seen her husband looking through the window from outside as the person stood behind her opened the curtain a little bit to see outside. Thereafter, she had heard her husband calling for help from neighbours. Hearing his cries the invaders had switched off the lights and run away from the scene. Imran Ali had chased them but could not apprehend anybody. Number of properties including jewelleries, gold and imitation, cash, mobile phones and Tabuas had been robbed from the house. She had recognised the appellant from the lights of the house. The matter had been reported to the police immediately and she had been taken to hospital. She had also recognised the appellant in open court.

[9] Imran Ali who was a businessman had lived with Ronika Kiran and her son at Lovu. On 26 October 2009 around 9.00pm he had gone out to buy some auto parts. When he came home about 9.30pm he had seen all curtains down in his room. When he called his wife she did not answer but he could hear somebody murmuring from his room. When he peeped through the window he had seen his wife taped around her mouth and three persons standing close to her. She was sitting on the bed and the appellant was standing beside her when he peeped through the window. He had identified the appellant and another person at that time. He had known the appellant as he was a friend of him for a long time. He had tried to enter the house from the rear door but it was closed. When he came to the front door, two of the intruders had run away through the main door and the appellant had escaped through the rear door.

[10] Imran Ali had then entered the house and untied his wife. She was bleeding from her forehead and in a terrified mood. He had left the house to go to the police. On the way

he had seen a van coming from the direction of his house. As he felt suspicious, he had slowed his vehicle and observed the van. He had seen two of the suspects getting in to the van but not seen the appellant boarding the getaway vehicle. He then followed them. On his way he called the police and informed the incident. As per the direction of the police he continued to follow the vehicle and saw the van stopped in front of a house at Waiyavi. At that time police also arrived and the police called the owner to open the door. But he took about 15 minutes to open the door. By that time those two suspects had fled the area from the rear door of the house. The witness had identified the appellant in open court. When all three were inside the house he identified them with the help of kitchen and other room lights. He was looking at the persons for about 30-60 seconds. The distance between the window and the bed was about one meter. When he checked the house he had found a number of items missing. They included mobile phones, cash and jewelleries. He had taken his wife to hospital. According to Imran Ali he had not had any dispute with the appellant before this incident.

[11] DC/Marika Qalocava of Lautoka Police CID branch was the investigating officer. On 26 October 2009 whilst on night patrol duty he had received a call from Lautoka Police with regard to a house robbery. As per the direction from the charge room he had gone to the scene and met Ronika Kiran who was bleeding on her forehead. He had noted that the victim was in a terrified mood and a cello tape around her neck. When asked her as to what happened the victim had told him that the appellant had assaulted her and put a cello tape around her mouth.

[12] After DC/Marika Qalocava received information about the getaway vehicle, he had gone in search of the vehicle. At Waiyavi the police had spotted the vehicle and brought the same to the police. As per information of the driver of the vehicle he had gone to a house at Waiyavi and called the owner to open the door. The owner opened the door after 10-15 minutes. By that time the suspects had fled the scene. He had recorded the details in his official diary and the relevant page was marked as P1 at the trial. The statements of the Ronika Kiran and Imran Ali had been recorded on 28 October 2009 as Ronika Kiran was not in a stable mood to give her statement on the day of the incident. Further, they had been instructed by the police to assess the missing items from the house. According to him three persons had been arrested in

connection with this case. They were Samuel Singh, Manueli Rainima and the appellant. The appellant had been arrested in Suva and brought to Lautoka. DC/Marika Qalocava had identified the appellant in open court.

01st ground of appeal

[13] The appellant argues that the trial judge had not given cogent reasons in overturning the assessors' opinion and in the process he had also failed to independently analyse the evidence.

The relevant law

[14] The Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) examined the trial judge's duty in ***disagreeing with the assessors*** and stated as follows:

> *'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have **"cogent reasons"** for differing from their opinion. The reasons must be founded on the **weight of the evidence** and must reflect the judge's views as to **the credibility of witnesses**: **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*
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> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[15] In **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) the appellant had been charged with murder under section 199 of the Penal Code and tried before three assessors who had unanimously found him guilty as charged, and the trial judge, ***agreeing with the assessors***, had convicted him and sentenced him to life imprisonment. The conviction and sentence was affirmed by the Court of Appeal, but on appeal to the Supreme Court the conviction was set aside on the basis that the Court of Appeal had failed to make an independent assessment of the evidence before affirming the verdict of the High Court which was found to be unsafe, unsatisfactory and unsupported by the evidence, giving rise to a miscarriage of justice. Justice Marsoof said:

> *'80. A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. 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.'*

[16] In **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having examined several decisions remarked:

> *'[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.'*

[17] The Court of Appeal in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) referring to ***Ram*** and ***Mohammed*** said of the trial judge's duty under section 237 of the Criminal Procedure Act, 2009 as follows:

> *'[13] While we accept that in **Ram** the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that*

it is unreasonable or cannot be supported having regard to the evidence (see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that ***where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment****. 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)****.'*

[18] In **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) where the ***trial Judge had agreed with the assessors***, Justice Marsoof clarified what His Lordship meant in paragraphs [79] and [80] in ***Ram*** as follows:

'[24] In arriving at its decision, this Court examined in paragraphs [79] and [80] of its judgment the difference between the jury system and the system of trial with assessors that prevails in Fiji, and concluded that in terms of section 299(2) of the Criminal Procedure Code, Cap 21, which was in force at the time of the High Court trial in 2008, as well as under section 237 of the Criminal Procedure Decree, which is currently in force, the trial judge was required to make an independent assessment of the evidence to be satisfied that the verdict of court is supported by the evidence and is not perverse. This Court also noted that if the trial judge disagrees with the unanimous or majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court". This Court was here simply setting out the requirements of the statutory law currently in force. In Praveen Ram, this Court did not, and did not have to in the circumstances of that case, express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors.

'[25] The confusion that surfaces in paragraphs [23] and [24] of the impugned judgment of the Court of Appeal arises from a failure to distinguish between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors. In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. ***Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors****. However, as was observed by this Court in paragraph [32] of its*

judgement in Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014),"an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."

[19] However, Justice Keith said in ***Chandra:***

'*[35] The majority of the assessors expressed the opinion that Chandra was guilty of murder. The trial judge agreed with the majority, but in his judgment he did not say why. The form of his judgment is heavily criticised by Chandra's legal team. They rely on* ***Praveen Ram v The State*** *[2012] FJSC 12 in which Marsoof JA said at [80]:*

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the [entirety] of the evidence led at the trial ... In independently assessing the evidence in the case, it is necessary for a trial judge ... to be satisfied that the ultimate verdict is supported by the evidence and is not perverse ..."*

[36] I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in ***Sheik Mohammed v The State*** *[2013] FJSC 2 at [32]:*

> *"An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."*

[37] But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.'

[20] When the trial ***judge affirms the opinion of the assessors*** his function was described by the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) in the following manner:

> *'[4] ……..Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under* ***section 237(3) of the Criminal Procedure Act*** *2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See:* ***Mohammed –v- The State*** *[2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[21] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), the petitioner had been convicted of murder after trial by the High Court judge where the learned ***judge*** by his judgment dated 16 September 2014, had ***overturned the unanimous opinion of the assessors*** that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations were made by Hon. Justice Saleem Marsoof:

> *'[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. ……..In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.*
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> *[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour,* ***it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors*** *that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.'*

[22] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the scope of trial judge's duty is when he agrees as well as disagrees with the majority of assessors.

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

[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the

judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[26] This stance is consistent with the position of the trial judge at a trial with assessors *i.e.* in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].

[27] I have examined the summing-up where the trial judge had reminded the assessors of the evidence led by the prosecution at paragraphs 16-24. He had also recorded the fact that the appellant had decided to remain silent as of his right but no adverse inference should be drawn against him (vide paragraphs 25, 29 and 32). The trial judge had embarked on an analysis of the evidence at paragraphs 26-34. It is very clear to me that the assessors' opinion cannot be justified on the evidence led against the appellant.

[28] The trial judge was correct in overturning the assessors' opinion and in doing so he had embarked on an independent analysis of the evidence and given cogent reasons. Therefore, there is no reasonable prospect of success and merits in this ground of appeal. Even otherwise, when the evidence led against the appellant is examined by this court the verdict of guilty clearly appears to be the right decision. This leads to another question.

Is failure to give cogent reasons alone fatal to a verdict?

[29] In **Johnson v State** [2013] FJCA 45; AAU90 of 2010 (30 May 2013) the state had not disputed that a failure to comply with the statutory requirement, whether because the reasons are inadequate or they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors. However, it has been subsequently argued by the state [for e.g. **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020)] that the consequence of failure to give 'cogent' reasons would not necessarily guarantee success for the appellant in appeal, for this court can adequately discharge its appellate function independent of the said failure on the part of the trial judge. The argument goes further to state that section 237(4) is silent on the consequence of failure to adhere to the section by the trial judge *i.e.* to give reasons in differing with the assessors and that while such a failure may constitute an error of law it does not follow that such failure would necessarily amount to a miscarriage of justice or for that matter a substantial miscarriage of justice. In other words, it is argued that lack of cogent reasons alone cannot found a successful appeal unless there has been a substantial miscarriage of justice.

[30] In other words, the argument proceeds to state that irrespective of whether the trial judge had failed to give cogent reasons in the judgment in disagreeing with the assessors, still the Court of Appeal could independently assess the totality of evidence by way of rehearing to determine whether there is any ground enumerated in section 23 Court of Appeal Act upon which the verdict should be set aside and if not, the verdict would not be disturbed. The appellate function is prescribed by section 23 of the Court of Appeal Act. There seems to be merits in this argument and it commends itself to me.

02nd ground of appeal

[31] The appellant has submitted that the trial judge had erred in law in not adequately directing or misdirecting himself of the significance of prosecution witnesses' conflicting evidence during trial. However, the inconsistencies and contradictions highlighted by the appellant are those in the police statements of Ronika Kiran and

Imran Ali which they do not appear to have been confronted with and given an opportunity, if possible, to explain at the trial. Thus, they cannot be regarded as inconsistencies and contradictions. As far as DC/Marika Qalocava is concerned the contradictions are supposedly with his official diary and the same issue highlighted above on Ronika Kiran and Imran Ali is equally applicable to his alleged contradictions as well. The judge had highlighted the entirety of evidence, as it was, led by the prosecution and I do not find any material inconsistency or contradiction in the summing-up or the judgment which cast doubt of the appellant's guilt in the light of the following principles. The same goes with the so called contradictions and inconsistencies highlighted by the appellant.

[32] The applicable test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows:

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

[33] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

> *'[35]…….Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person*

to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"

[34] Therefore, there is no reasonable prospect of success and merits in this ground of appeal.

[35] The 03rd to 05th grounds of appeal are raised for the first time before the full and not even remotely urged before the single Judge of this court. In **Vetau v State** [2016] FJSC 9; CAV008.2015 (21 April 2016) the Supreme Court remarked:

> *'50. In **Lucke** v **Clearly** & Otrs (2011 iii SASR 134) the Supreme Court of South Australia has held that in regard to a point abandoned at trial, it would not be in the interests of justice to allow it to be raised on appeal.*
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> *The court further observed that:*
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> *(i) The threshold test to be met by a party seeking to raise an argument for the first time on appeal is high. An appeal court will only permit a party to do so in the most exceptional circumstances....."*
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> *51. In the case **Whisprun Pty Ltd.** v **Dixon** **(2003) ARI 447** the High Court of Australia observed that:*
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> *" It would be adverse to the due administration of justice if, on appeal a party could raise a point that had not been raised at trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not raised at trial or might possibly have been met rebutting evidence or cross-examination."*

[36] Given that the appellant had been sentenced on 13 October 2014, the delay in raising the new grounds is over 04 years and 04 months. Therefore, this court would now follow ***Nasila*** guidelines regarding those grounds of appeal and see whether enlargement of time should be granted to urge them before this Court. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

> *'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should*

be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.'

'[15] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in ***Rasaku v State*** *CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and* ***Kumar v State; Sinu v State*** *CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.*

[37] Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[38] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[39] It is clear that the delay is very substantial and appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would still be inclined to grant extension of time (vide ***Nasila).*** The respondent had not averred any prejudice that would be caused by an enlargement of time.

03rd ground of appeal

[40] The appellant argues that the trial judge had not directed the assessors on the third and last element of the offence namely *'at the time of the or immediately before or*

immediately after such robbery uses or threaten to use of any personal violence', thus causing a substantial miscarriage of justice.

[41] The trial judge had addressed the assessors on this element of robbery at paragraph 13 of the summing-up as follows:

> *'[13] The offence of Robbery with Violence also has an element of force or violence. It is the stealing of something by an act of force. The force can be either implied from the carrying of weapons, or from the number of people involved in the incident. So when a group of people enter a house for an instance, to take money without the owner's consent with no intention of returning it, then the offence of robbery is committed.*

[42] If the counsel for the appellant had thought that this direction was so inadequate he should have raised it with the trial judge by way of a request for redirection. He had failed to do that and as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018) the failure to do so without any cogent reasons would disentitle the appellant even to raise this complaint in appeal with any credibility.

[43] In any event, there is overwhelming evidence by Ronika Kiran that the appellant had threatened her with violence and indeed perpetrated personal violence on her at the time of or immediately before or immediately after the robbery. Imran Ali and DC/Marika Qalocava had clearly seen the injuries on Ronika Kiran soon after the robbery. There is no need to produce medical evidence to prove this aspect of the case and the defence does not appear to have contested it either. Therefore, there is no real prospect of success and merits in this ground of appeal.

04th ground of appeal

[44] The appellant contends that the trial judge had erred in allowing the 'crucial' evidence of the page from DC/Marika Qalocava's official investigation diary as an exhibit at the trial in violation of sections 134(2)(a) (c), 4(c) and 290(1)(b)(c) of the Criminal Procedure Act, 2009. The gist of his argument seems to be that the prosecution had

not disclosed this item of evidence to the defence as required by law and its authenticity was questionable for lack of any official stamp, seal or marking.

[45] The state has submitted that DC/Marika Qalocava had used his official investigation diary to refresh his memory as he had apparently not given a statement following his investigation. In any event, according to the state this extract relevant to the investigation into the robbery concerned had been disclosed to the defence prior to the witness being called to give evidence and the case had been adjourned for 45 minutes for the defence to go through the documents. The defence does not seem to have objected to the marking of the relevant page as P1 on the basis of its authenticity at the trial either.

[46] Therefore, I do not think that any breach of procedure of such magnitude as to affect the fairness of the trial had occurred as a result of allowing DC/Marika Qalocava to refer to his official investigation diary and marking the relevant page as an exhibit. In any event, his evidence was not the crucial evidence in the case as far as the prosecution and defence were concerned. Ronika Kiran's evidence alone when believed was sufficient to prove the case against the appellant. Therefore, there is no real prospect of success and merits in this ground of appeal.

05th ground of appeal

[47] This ground of appeal concerns the alleged lack of competency of the appellant's trial lawyer from the Legal Aid Commission.

[48] The Court of Appeal set down the procedure to be followed prior to advancing a ground of appeal based on criticism of trial counsel in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not followed the guidelines given in ***Chand*** and therefore, the merits of this ground of appeal cannot be considered at this stage.

[49] The unsubstantiated allegation that the counsel advised him to remain silent when he wanted to take the stand in his defence is not a valid ground of incompetency. Other

than a denial the appellant does not seem to have taken up any other defence in cross-examining Ronika Kiran.

[50] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court stated:

> *'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……'*

[51] In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case.

[52] In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam [**1988] Crim. LR 109 CA (Crim Div):

> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*

[53] O' Connor LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel's mistaken understanding of the law, despite having a defense which was likely to have

succeeded, was regarded as grounds of appeal though not being a case of *'flagrantly incompetent advocacy'*.

[54] Even if the appellant's allegation is true, I have no doubt that his counsel would have advised him to remain silent as the best course of action and it could not amount to flagrantly incompetent advocacy that had resulted in a miscarriage of justice. Therefore, there is no real prospect of success and merits in this ground of appeal.

Supplementary ground of appeal on non-availability of the High Court record.

[55] When this appeal was mentioned on 10 July 2020 after copy records (certified on 23 June 2020) were served on the appellant and the respondent, both parties indicated that they were aware that the judge's notes and transcript of audio recording, if available during the trial, were not included in the appeal records. On 03 September 2020 it was informed to the parties that judge's notes could not be located and audio recording of trial proceedings may not have been available at Lautoka High Court during the trial in 2014 and therefore no transcript was available. The appellant informed court that he was willing to proceed to the appeal hearing before the full court on the available appeal record. In any event the appellant had already tendered his renewal notice along with amended grounds and lengthy written submissions dated 08 March 2019. He had also filed a notice of motion and an application to adduce fresh evidence supported by an affidavit on 08 April 2019.

[56] Since the appellant indicated his willingness to proceed to the hearing of the appeal this court directed the respondent to file its written submission which had been tendered on 08 January 2021. However, in the meantime on 10 September 2020 the appellant had filed a supplementary ground of appeal based on the non-availability of the trial proceedings and supporting submissions thereof.

[57] The appellant contends that without the trial proceedings he cannot point out the inconsistencies and contradictions. In the case of an appellant in person it is the responsibility of the Registrar to prepare the record inclusive of the judge's notes (vide Rule 44 of the Court of Appeal Rules). The trial judge is required to furnish the

judge's notes to the Registrar (section 27 of the Court of Appeal Act). However, despite efforts, which had taken a long time, by Lautoka High Court registry and the Court of Appeal registry it has not been possible to trace the judge's notes.

[58] However, a reasonable idea as to the inconsistencies and contradictions the appellant wanted to highlight with the evidence led at the trial could be gathered from his detailed written submissions under the second ground of appeal. They relate to the evidence of the three prosecution witnesses. In respect of Ronika Kiran and Imran Ali the appellant has submitted certain inconsistencies with their statements to the police. While they do not appear to be shaking the credibility of the witnesses, the mere statements to the police do not become inconsistencies, contradictions or omissions unless the witnesses had been confronted with the same at the trial where they could admit, deny or explain them. From the summing-up or the judgment of the trial judge it does not appear that any of those inconsistencies and contradictions had been brought up during the trial. Nevertheless, those alleged inconsistencies and contradictions cannot materially affect the credibility of Ronika Kiran and Imran Ali. As far as DC/Marika Qalocava's evidence is concerned the appellant has submitted that the contradictions pointed out are between his evidence and official diary. However, the alleged contradictions would not affect his evidence as a whole or the prosecution case against the appellant.

[59] Therefore, I think that while the appellant was entitled to the judge's notes as part of the appeal record the absence of them has not materially affected his prospects in this appeal though it might have been a ground for alternative relief based on judicial review or constitutional redress.

[60] In the circumstances, there are no merits in the supplementary ground of appeal.

Application to lead fresh evidence

[61] The fresh evidence the appellant seeks to adduce is that of his escorting officer SC 4187 Siriako Masala to the effect that the witness had seen Ronika Kiran and Imran Ali talking to each other during the trial.

[62] Section 28 of the Court of Appeal Act, provides that the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice receive fresh evidence by way of documents or witnesses (see **Mudaliar v State** Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 and **Chand v State** CAV0014 of 2010: 9 May 2012 [2012] FJSC 6).

[63] In **Tuilagi v State** AAU0090 of 2013: 14 September 2017 [2017] FJCA 116 the Court of Appeal considered several past decisions and held that the main criteria for fresh evidence at the appeal stage is set out in **Ladd v Marshall** [1954] 3 All ER 745:

> *'[36] The Supreme Court in **Mudaliar** quoted with approval **Ladd v Marshall** [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well:*
>
> *(i) the evidence could not have been obtained prior to the trial by reasonable diligence;*
>
> *(ii) it must be such as could have had a substantial influence on the result; and*
>
> *(iii) it must be apparently credible.'*
>
> *'[37] **Tuimereke v State** Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to **Ratten v R** [1974] HCA 35; (1974) 131 CLR 510 and **Lawless v R** [1979] HCA 49; (1979) 142 CLR 659. In both **Ratten** and **Lawless** the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.'*
>
> *'[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:*
>
> *"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."*

[64] According to the appellant's affidavit he and his escorting officer had seen Ronika Kiran and Imran Ali talking to each other and both of them had instructed the defence

counsel to inform the judge but the defence counsel had not done so. SC 4187 Siriako Masala in his self-recorded statement to the police on 02 October 2014 had stated that after her examination-in-chief was over during the short adjournment Ronika Kiran and Imran Ali were seen by him and the appellant from a distance talking to each other for a few minutes with the former explaining to the latter *'what she said in open court under oath'.*

[65] Firstly, it is very clear that Ronika Kiran and Imran Ali could have been confronted with this allegation at the trial and it had not happened. Secondly, there was every opportunity for the appellant and SC 4187 Siriako Masala to have given evidence on what they saw at the trial. Thus, this evidence was very much available during the trial. For the first time, this matter had been raised after 04 years and 06 months. Therefore, it is neither credible not has a substantial influence on the result or even if accepted would produce a different verdict. There was nothing new for Ronika Kiran and Imran Ali to discuss about their testimony in the court premises as they were de facto wife and husband living under the same roof since the incident happened.

[66] Accordingly, the application to lead fresh evidence is refused.

Bandara, JA

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

Orders

1. Leave to appeal against conviction on 01st and 02nd grounds of appeal refused.
2. Enlargement of time to appeal against conviction on 03rd to 05th grounds of appeal and the supplementary ground of appeal is refused.
3. Application to lead fresh evidence is refused.
4. Appeal against conviction is dismissed.

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL