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

CRIMINAL APPEAL NO. AAU 0085 of 2016
[In the High Court at Lautoka Case No. HAC 075 of 2014]

BETWEEN : **SUDESH ANAND KISHORE**

Appellant

AND : **STATE**

Respondent

Coram : **Gamalath, JA**
: **Prematilaka, JA**
: **Dayaratne, JA**

Counsel : **Mr. M. Fesaitu and Ms. K. Vulimainadave for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **04 May 2022**

Date of Judgment : **26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Prematilaka, JA in draft and I agree with his reasons and the conclusion.

Prematilaka, JA

[2] The appellant had been granted enlargement of time to appeal on two grounds of appeal against conviction entered by the High Court against him on one representative count of rape under section 149 and 150 of the Penal Code and another representative count under section 207 (1) (2)(a) and (3) of the Crimes Act, 2009 alleged to have been committed at

Sigatoka in the Western Division for having had carnal knowledge of SL (name withheld) who was under the age of 13 years.

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape under both counts. The learned trial judge had concurred with the assessors, convicted the appellant as charged and sentenced him on 06 May 2015 to 13 years of imprisonment with a non-parole period of 12 years.

[4] The appellant's counsel pursued only two grounds of appeal where enlargement of time to appeal had been granted against conviction. They are as follows.

1. *The learned Trial Judge's direction to the Assessors on prior inconsistent statements has caused a substantial miscarriage of justice in that:*
   i. *The direction is a misdirection as it is not inconsistencies with the police statements but that of an omission on the police statements; and*
   ii. *The direction if taken in its entirety is inaccurate and inadequate relating to the weight to be attached.*

2. *The learned Trial Judge erred in law and in fact by inadequately directing the Assessors on the alibi defence taken up by the Appellant that he was elsewhere at the alleged time the offences is said to have been committed therefore causing substantial miscarriage of justice.*

The factual matrix

[5] According to Sundar Kaur, SL's biological mother, SL was born on 27 August 2002 and from the hospital she was taken to Bimla's house for her to adopt SL. After 10 years SL had come back to her mother in 2012 and the mother found her to be very naughty. SL had told her that she didn't like when her brothers hugged her. SL had also told her that the man took out his private part and put it in her private part and some milk like thing came out and he had put it on her face. Sundar had taken her to the Women Crisis Centre and from there SL had been taken to Central Police Station. Sundar had admitted that she did not tell the police what SL said about the man putting his private part in her private part because at the Police Station she did not talk much and further the police asked only about her.

[6] SL had said that while she was staying with her aunt Bimla Wati the appellant whom she called uncle was also living with them. Bimla used to work at a restaurant 05 days a week. Whenever SL did not go to school she used to stay with the appellant. She said that the

accused did bad things to her at home when nobody else was around. According to SL, bad things were that the appellant used to touch her private part. When she shouted, accused used to put his hand on her mouth. She said that she did not like the bad things the appellant did. She described that the appellant used to use his 'boys' thing' in her private part. Though, she had told Bimla what the appellant did she had not believed her. She had told Bimla that the appellant would hold her and put the white milky thing on her face and take her to the jungle and do bad things. She said that he did it at home too. Apart from Bimla she had told her sister Shanti also of what the appellant did to her. She had told Shanti that the appellant used to put his private part into hers and it had happened many a time. When he did these things, sometimes Bimla had been at home.

[7] Shanti, one of Bimla's sisters had said in evidence that in 2010 SL was living with Bimla and the appellant in Sigatoka and sometimes when Bimla went to work SL used to be with her and after the appellant had left Bimla SL had been staying with her for 02 years *i.e.* 2010 and 2011. The witness also had said that 'SL' once told her that the appellant was holding her and she had demonstrated how 'SL' showed her as to how the appellant held her. When the witness told Bimla about this, Bimla had told her that it was a lie.

[8] The appellant's cautioned interview where he had confessed to two acts of sexual intercourse with SL in 2010 and one in 2011 and the charge statement where the appellant had admitted the charges against him were also part of the prosecution case. Though, the appellant had challenged the voluntariness of them at the trial, he had not sought to challenge them in appeal.

[9] Dr. Evelyn Tuivuga who examined SL on 28 May 2012 had testified that the vagina of the victim was gaping open. She had also noted that there were no injuries, no bruises and no cuts. She said that she could not see the hymen. Her conclusion was that the medical findings were consistent with penetration with a blunt object such as a penis.

[10] The appellant had taken the stand and said that in 2001 SL and Bimla were living with him in Olosara, Sigatoka but in 2009 he had got separated and never went back to them. Under cross-examination he had claimed that he was not living in the same house with SL but she was with Shanti. He had returned to Sigatoka only in 2014. Under cross-examination the appellant had admitted to have worked in Sigatoka in 2012 for 03 months. His position

appears to have been that in 2009 he was in Sabeto, Nadi and in 2010 and 2011 he was in Nadi and therefore could not have committed the offending alleged against him. However, he had admitted in examination-in-chief itself that Bimla and SL were living with him in 2011.

01st ground of appeal

[11] The first ground of appeal is concerned with the directions given on alleged inconsistencies of the prosecution witnesses and based on what the trial judge had summed-up to the assessors at paragraph 53 of the summing-up. It is as follows.

> '*You may have observed that when some witnesses gave evidence, there were some inconsistencies before the evidence before this court and the statement given to the police. What you should take into consideration is only the evidence given by the witness in court and not any other previous statement given by the witness. However you should also take into consideration the fact that such inconsistencies between the evidence before court and statement to police, can affect the credibility of the witness. Inconsistencies per say in their own evidence in court also can affect the credibility of the witness. It is for you to decide which witnesses you are going to accept as reliable and which are not.'*

[12] The appellant's complaint is twofold. Firstly, his counsel submits that what was pointed out under cross-examination of SL and her mother were not inconsistencies but omissions. The directions were on inconsistencies but not on omissions and therefore flawed. I shall now consider the first plank of the counsel's submission.

Applicable law

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

> *'[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)'*

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

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

[15] The alleged omissions complained of are contained at paragraphs 21 and 25 of the summing-up respectively consisting of what SL's mother and SL had said under cross-examination.

'……. She said that she did not tell the Police in that statement what 'SL' said about the man putting his private part in her private part. She said that she did not tell the Police because at the Police Station she did not talk much. She also said that the Police asked only about her……'

'……….She said that she did not tell the Police that the accused used to put his hand on her mouth when she shouts. She also did not tell the Police that accused used to put the milky thing on her face. She however said it happened. She said that the lady at the Police Station did not listen to her full story.'

[16] Sundar Kaur, SL's mother anyway spoke only on some peripheral matters and her evidence was not treated even as recent complaint evidence. She had admitted the omission but explained why she did not come out with the impugned part in her police statement.

[17] SL was 09 years old at the time of her police statement. It is clear, that the omitted parts are not on the acts of penetration but on other incidental matters. It is not surprising that SL being a 09 year old child may have omitted to say things which were not directly part of the probe by the police or as she had explained the police officer may not have devoted enough time to listen to her full story.

[18] Admittedly, the trial judge had not addressed the assessors specifically on the alleged omissions. Nor had he addressed his mind to them in the judgment. The defence counsel had not sought any re-directions either. Therefore, appellant is not even entitled to raise this as a point of appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)]. The assessors must have listened to those omissions and the explanations by SL and her mother in the course of the trial. Now, it is for this court to assess the impact of those omissions on the ultimate verdict.

[19] The appellant's complaint has to be considered in the context of section 23(1) of the Court of Appeal Act which provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In other words, although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice. Thus, for an appellant to succeed he or she must demonstrate that not only is there a miscarriage of justice but also there is a substantial miscarriage of justice.

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

to *convict*. However, finding that it was *not open* to the jury to *acquit* (that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice.

[21] However, if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. In other words, if the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred. In this process, the appellate court examines the record to see whether, notwithstanding the fact that the evidence of the complainant was assessed by the fact finders to be credible and reliable, either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence, the Court could be satisfied that the fact finders, acting rationally, ought not to have been satisfied of the witnesses' truthfulness and reliability or they ought nonetheless to have entertained a reasonable doubt as to proof of guilt [vide **Pell v The Queen** (supra)]. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the fact finders, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (see **M v The Queen** (1994) 181 CLR 487, 494. See also **Inia v The Queen** [2017] VSCA 49, [53]).

[22] A misdirection of law may or may not amount to a miscarriage of justice. Whether it does so, depends on the context of the trial and the matters in issue. This is the same with a non-direction as alleged by the appellant in this case. One example is where misdirection relates to a matter which is not in dispute and which could not mislead the jury regarding any matter in issue (**Tunja v R** (2013) 41 VR 208; [2013] VSCA 174 per Maxwell P and Weinberg JA (Priest JA contra).

[23] In the light of the above discussion on the relevant law, I have examined the alleged omissions and lack of directions on them by the trial judge. However, on the whole of the material on record, I cannot conclude that the omissions highlighted by the appellant are so

significant that the assessors and the trial judge notwithstanding the advantage of having seen and heard SL and her mother ought to have entertained a reasonable doubt of their truthfulness, reliability and credibility. In my view, any reasonable fact finders properly directed on the alleged omissions would, on the whole of the evidence, without doubt have convicted the appellant. To me, the conviction was inevitable based on the written record of the trial. Thus, there is no miscarriage of justice by reason of the verdict being unreasonable or not supported by evidence. Therefore, there is no necessity to invoke the proviso to section 23(1) of the Court of Appeal Act. However, I am of the view that had it been necessary to consider the proviso the conclusion that there had been no substantial miscarriage of justice would have been open to the Court.

[24] Secondly, supported by **Jabbar v State** [2014] FJCA 138; AAU0026 of 2012 (29 August 2014) the appellant submits that as a whole the direction at paragraph 53 is inadequate in as much as the trial judge had not indicated to the assessors that any inconsistency goes to the credit and the weight to be attached to the evidence. As far as this complaint is concerned it appears from paragraph 53 of the summing-up that the trial judge has only directed the assessors that inconsistencies with previous statements (*inter se*) and within evidence (*per se*) can affect the credibility of the witnesses. While on its own this direction may not be inadequate, I do not think that the inadequacy in the overall contest of the evidence presented would have led to a different decision by the fact finders. The same discussion on the law on the first part of ground 01 is applicable here as well.

02nd ground of appeal

[25] The appellant's argument here is that the trial judge had not adequately addressed the assessors on his *alibi* defence. The impugned directions are found at paragraph 59.

> *'The accused says that he was elsewhere during the period alleged to have committed the offences. The burden of proving the accused person guilt and that he committed the offences alleged beyond reasonable doubt remains with prosecution all times. It is for prosecution to prove that he committed the crime and not the accused to prove that he was elsewhere.'*

[26] Evidence of *alibi* means *'evidence tending to show by reason of the presence at a particular place or in a particular area at a particular time he was not, or was unlikely to have been at the place he was not, or was unlikely to have been at a place where the*

offence is alleged to have been committed at the time of its alleged commission' per Fatiaki, J in **Andrew Ian Carter v State (**1990) 36 FLR 125. The law is that when an accused raises *alibi* as a defense, in addition to a general direction on burden of proof, the judge should direct assessors that prosecution must disprove an *alibi* and even if they conclude that the *alibi* is false, it does not by itself entitle them to convict the accused (vide **Ram v State** [2015] AAU 87 of 2010 (02 October 2015). On a similar complaint that inadequate directions were given by the trial judge with regard to the late *alibi* notice, the Supreme Court had stated that non-compliance with 21 day statutory period for *alibi* notice is a matter that goes to the weight of an *alibi* [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]

[27] As far as this case is concerned, it is clear that the appellant had not given *alibi* notice at all as required by section 125 of the Criminal Procedure Act, 2009. However, he had given evidence arguably on an *alibi* without objection by the State and without leave by the trial judge. When the appellant did not give any *alibi* notice as required by section 125 but only raised an *alibi* of him having been at Nadi in 2010 and 2011 without details of names of people who could confirm his *alibi* and other details, it is clear his defence was more of a denial than an *alibi*.

[28] However, the appellant's counsel argues that what the appellant had stated in the cautioned interview should be treated as adequate notice of his *alibi*. On a perusal of the cautioned interview it appears that the appellant had fully admitted in detail the incidents relating to the two counts in the information and said that the first and second sexual encounters took place at Olosara, Sigatoka at Bimla's house in 2010 and the second at the same place in November 2011. In answer to another question relied on by his counsel, the appellant had said that he was at Sabeto, Nadi cutting sugarcane in 2011. Thus, it is clear there is no unequivocal and verifiable *alibi* taken up even in the cautioned statement regarding his whereabouts in 2010 and 2011. The appellant had provided little information even in his cautioned interview that could have been probed by the investigators at the time of the investigation to check on his *alibi.* Therefore, failure to give notice of *alibi* should in this instance significantly erode the credibility and weight of his alleged *alibi* defense.

[29] Cutting across his so called *alibi* the appellant in the examination-in-chief of his evidence had said that in 2011 SL and Bimla were living with him at Olosara, Sigatoka, the place of

offending. Nevertheless, out of abundance of caution the trial judge had directed the assessors on his *alibi* in the summing-up. Given the fragile and lackadaisical nature of his so called *alibi* the trial judge's directions, though not complete by itself, that it was not for the appellant to prove that he was elsewhere but the prosecution must prove his guilt beyond reasonable doubt could not have caused a miscarriage of justice leave aside a substantial miscarriage of justice.

[30] Consequently, I hold that there is no merit in the assertion that the verdict is unreasonable and cannot be supported by evidence. I am also of the view that that there is no miscarriage of justice. As a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed.

Dayaratne, JA

[31] I have read the judgment in draft of Prematilaka, JA and I agree with his reasons and conclusion.

Order

(1) Appellant's appeal against conviction is dismissed.

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL