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

CRIMINAL APPEAL NO: AAU 0027 OF 2012
[High Court Case No: HAC 151/10 Ltk]

BETWEEN	:	**ANTHONY**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	Goundar JA
Counsel	:	Mr. A. Singh for the Appellant Mr. M. Delaney for the Respondent
Date of Hearing	:	29 May 2014
Date of Ruling	:	6 March 2015

RULING

[1] The appellant was sentenced to 14 years' imprisonment after he was found guilty of rape by the High Court at Lautoka. This is his timely application for leave to appeal against conviction and sentence on the following grounds:

Appeal against Conviction

1. *That the Learned Judge erred in law in failing to declare a mistrial after disqualifying Assessor No. 1 after this person was found talking to the Investigating Officer after the adjournment on 29 March 2012.*

2. *That the Learned Judge erred in law in failing to declare a mistrial after discovering a misconduct by Assessor No. 1 who was found talking to the Investigating Officer after the adjournment on 29 March 2012.*

3. *That the Learned Judge erred in law in failing to declare a mistrial after disqualifying Assessor No. 1 whose actions brought the court and criminal justice system into disrepute and question.*

4. *That the Learned Trial Judge erred in law in failing to declare a mistrial after disqualifying Assessor No. 1 on the grounds that the other two assessors could be biased or could be seen to be bias and under these circumstances brought the court and the criminal justice system into disrepute and question.*

5. *The Learned Judge erred in law in failing to provide a balanced and adequate summing up of the Prosecution evidence that were favourable to the defence and as such there was a substantial miscarriage of justice.*

6. *That the Learned Trial Judge erred in law and fact in not adequately directing the assessors on the significance of the Prosecution witness conflicting evidence during the trial.*

7. *That the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors on previous inconsistent statements by the Prosecution witnesses.*

8. *That the Learned Trial Judge erred in law and in fact by ruling on Voir Dire that the medical report of the Complainant was admissible.*

9. *That the Learned Trial Judge erred in law and in fact by not directing the assessors to disregard the evidence of Prosecution Witness Miriama Nadumu when she gave evidence in Court regarding drawing of the plan of the alleged scene of the incident when the said plan was held inadmissible by the Learned Trial Judge.*

10. *That the Learned Prosecutor failed to tender in Court the clothes that were worn by the complainant that included her panty because if the allegation was true the panty would have blood stains and by not doing so there was a substantial miscarriage of justice.*

Appeal against Sentence

1. *That the appellant appeals against sentence as it is manifestly harsh, excessive and wrong in principal under the circumstances of the case.*

2. *That the Learned Trial Judge erred in law in failing to use proper sentencing guidelines resulting in a sentence which was harsh and excessive.*

3. *That the Learned Trial Judge erred in law and in fact in not taking into account the age, the medical ground and condition of the Appellant.*

[2] In his written submissions, counsel for the appellant has focused on grounds 1 to 4 only. In respect to grounds 5 to 9, counsel submits that further particulars will be provided upon the receipt of the court record. No submissions have been made in respect to the grounds against sentence. Counsel for the State submits that without the particulars the grounds are inadequate and cannot be considered valid grounds of appeal.

[3] It is the responsibility of the appellant to provide the particulars of the alleged error so that the opposing party can properly respond to the grounds. The practice of the High Court is to provide written rulings, summing up, judgment and sentence to all the parties involved after the conclusion of the trial. If the alleged error relates to the directions in the summing up, or rulings made by the trial judge in the course of the trial, for instance on admissibility of evidence, the appellant should be able to present grounds with adequate particulars based on the documents provided to him after the conclusion of his trial. The appellant cannot escape his responsibility to provide valid grounds of appeal by saying further particulars will be available upon receipt of the court record. Appellate courts will insist that the appellants provide valid grounds of appeal so that the question of leave can be considered judiciously.

[4] Grounds 1 to 4 relate to the trial judge's ruling in which he refused to order a mistrial upon an application by the appellant. The principles governing a mistrial were explained by the High Court of Australia in **Crofts v R** (1996) 70 AJLR 917 at p 927:

> *"No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the state at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial discretion designed to overcome its apprehended impact. As the court below acknowledge, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."*

[5] In the present case, the trial commenced before the trial judge sitting with three assessors. After the assessors were sworn, the trial was adjourned due to bad weather. When the trial resumed after three days and before any evidence was called, counsel for the appellant moved for one of the assessors to be discharged after she was seen having a conversation with a police witness in the trial. The trial judge called the assessor concerned and made an inquiry with her regarding the alleged conversation. The assessor admitted that she only greeted the witness and there was no further conversation. The trial judge discharged the offending assessor and decided to continue with the trial with the remaining two assessors. This procedure was available under section 225(2) of the Criminal Procedure Decree 2009. At that stage, counsel for the appellant supported the trial judge's decision to continue with the trial with the two remaining assessors.

[6] After the end of the defence case and before the summing up was delivered, counsel for the appellant changed his position and applied for a mistrial. The basis for the application for a mistrial was that the offending assessor may have had a conversation with the other two remaining assessors about her conversation with the police witness. The trial judge in a detailed ruling rejected the proposed ground for the mistrial saying it was ill founded and misconceived. I agree. The proposed ground for a mistrial was clearly based on speculation and not on evidence. The offending assessor was discharged before any evidence was called. At that stage counsel for the appellant did not see any irregularity. It was only after all the evidence was concluded, counsel for the appellant applied for a mistrial. The trial

judge concluded that bringing an application for a mistrial so late was an abuse of process. I agree with this finding. I am satisfied that there was no irregularity in the trial to render the entire process unfair to the appellant for the trial judge to order a mistrial. Grounds 1 to 4 are not arguable.

[7] Grounds 5 to 9 lack the necessary particulars to make an assessment whether they are arguable. I consider these grounds to be invalid.

[8] Ground 10 relates to physical evidence that was not tendered. Counsel for the appellant submits that the prosecution should have tendered the complainant's underwear because the underwear would have contained blood stains if the allegation was true, and by not producing it in court there was a substantial miscarriage of justice. This ground is not arguable. Firstly, there was no evidence that the complainant's underwear had blood stains. Secondly, if the underwear was not produced as an exhibit, neither the trial judge nor the assessors were entitled to speculate why it was not produced.

[9] The appellant's main complaint is that his sentence is excessive given his old age, good character and medical history. At the time of sentencing, the appellant was 66 years old while the victim was 5½ years old. It is not clear if the trial judge was informed of the medical history of the appellant, if he had any. The trial judge in his sentencing remarks noted that although the appellant's good character was a mitigating factor, the serious aggravating circumstances outweighed the appellant's personal circumstances and previous good character.

[10] The prosecution case against the appellant was strong. The victim was sent to the appellant's home by her mother to borrow some potatoes. They were neigbours. When the victim was late to return home, her mother went to the appellant's home and noticed all the doors were closed but the victim's shoes were outside the house. When the victim's mother knocked at the door, the appellant opened it. The victim came out crying and told her mother that the appellant had poked and licked her 'busi' (vagina). The mother confronted

the appellant but he denied the assault. The matter was reported to the police and the following day, the victim was medically examined. The examining doctor found redness on the victim's genitalia and tear on the hymen on two positions.

[11] Apart from the appellant's previous good character, there was no other compelling mitigating factor. The trial judge gave a reduction of two years for the appellant's previous good character. The sentence of 14 years' imprisonment is within the tariff for child rape (**Anand Abhay Raj v The State** unreported Criminal Appeal No. CAV003 of 2014; 20 August 2014). There is no arguable error in the sentencing discretion of the trial judge.

Result

Leave to appeal against conviction and sentence is refused.

.....
Hon. Mr. Justice Daniel Goundar
Justice of Appeal

Solicitors:
Aman Ravindra-Singh Lawyers for the Appellant
Office of the Director of Public Prosecutions for the State