IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO.AAU 120 of 2014
(High Court Criminal Case No. HAC 31 of 2014)

BETWEEN	:	**BALBIR SINGH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Gamalath, JA** **Prematilaka, JA** **Fernando, JA**
Counsel	:	**Mr. M. Fesaitu with Ms. S. Prakash for the Appellant** **Ms. S. Alagendra for the Respondent**
Date of Hearing	:	**12 September 2018**
Date of Judgment	:	**04 October 2018**

JUDGMENT

Gamalath, JA

[1] I have read in draft the judgment of Prematilaka, JA and I am in agreement with his reasoning and the conclusions.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on a single count of having had carnal knowledge of 07 year old P (name withheld) between 01 April 2011 and 30 April 2011 alleged to have been committed at Sigatoka in the Western Division under section 207 (2) (a) the Crimes Decree, 2009 (now the Crimes Act, 2009).

[3] After trial the assessors expressed unanimous opinions that the Appellant was guilty of the single count. The Learned High Court Judge concurred with their opinion and convicted the Appellant in his Judgment on 20 August 2014. On 01 April 2014, the Learned Judge imposed a sentence of 14 years, 06 months and 20 days of imprisonment with a non-parole period 13 years of imprisonment (*i.e.* the mandatory period to be served before the Appellant becomes eligible for parole) to run from the date of the sentence of the Appellant.

Preliminary observations

[4] The Appellant had filed an untimely application for leave to appeal but with the consent of the State the single Judge of the Court of Appeal had considered it as a timely application as his original application had been misplaced by the Correction Service. He had sought leave to appeal against the conviction on four grounds of appeal and on a single ground of appeal against the sentence. The single Judge of the Court of Appeal had granted leave to appeal on 26 February 2016 in respect of 02nd, 03rd and 04th grounds of appeal against the conviction and the sole ground of appeal against the sentence. The Legal Aid Commission appearing on behalf of the Appellant indicated at the hearing of the appeal that it would abandon the first ground of appeal against the conviction which in any event had not been renewed before the Full Court and the sole ground of appeal against the sentence and would rely on the written submissions filed at the leave stage in respect of the rest. The State had addressed all the grounds of appeal in its fresh written submissions as well as in the written submissions filed previously.

[5] The Respondent had in its written submissions filed on 20 August 2018 had requested this Court to enhance the sentence imposed by the High Court on the Appellant by exercising its powers under section 23(3) of the Court of Appeal Act and to revisit the tariff on child rape cases by virtue of its powers under section 6 of the Sentencing and Penalties Act. The Respondent has filed in this Court statistics released by the Director of Public Prosecutions to show that between May 2015 to July 2018 out of 933 cases of rape and sexual offences, in 445 cases the victims had been children and out of the said 445 cases 292 victims had been children under the age of 14. Between

January and July 2018, 123 cases of rape and sexual violence have been filed and in 78 of them the victims had been children. Out of the said 78 cases, 26 victims had been 10 years of age and below and 14 victims had been aged 07 years and below.

[6] However, when the Appellant withdrew the ground of appeal against his sentence the Counsel for the State informed Court that there was no longer any legal basis for this Court to consider the application for enhancement or even to revisit the tariff in respect of child rape cases and therefore, would not pursue those two matters in this instance though the Court of Appeal had held that it could act under section 23(3) of the Court of Appeal Act on its own even if there is no appeal against the sentence if it thinks that a different sentence should have been passed (vide **Waisele v State** AAU0081 of 2013:30 November 2017 [2017] FJCA 136).

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 erred in law and in fact when he did not direct himself and the assessors that the prosecution witness no. 2 would have implicated the Appellant in avenge.'

Ground 2

'The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that the opinion and evidence given by the doctor does not confirm the guilt of the Appellant.'

Ground 3

'The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that there may be more than one operative cause for the hymen not to be intact.'

Summary of evidence

[8] According to the agreed facts made available to the trial court on 20 June 2014, the Appellant is an uncle (father's half-brother) of the victim who was 08 years old (born on 25 May 2005) and a Year 3 student. The Appellant, 48 years of age had been residing with the victim, her two sisters and her parents between 2012 and the date time of the incident *i.e.* 09 March 2014 in Sigatoka.

[9] According to the victim, around 12.00 noon on the date of the incident the victim and her sister had been playing with the Appellant's mobile phone and the mother had asked the victim to return the phone to him. The victim had gone to the Appellant's room and given the phone to him. The Appellant had asked her to lie on the bed and asked her sister to hold the curtain towards the window. Then, the Appellant had taken out his penis and inserted it from the front and the back of the victim who had pointed out to her private part and the back side of her body at the trial. She had said that she felt pain. A little later the victim's mother had called her, taken her to her bedroom and asked what the Appellant was doing and the victim had told her mother what the Appellant had done. Under cross-examination, the victim had denied that her mother had persuaded her to implicate the Appellant. She had also denied the suggestion that the Appellant had not inserted his penis into her vagina and insisted that he had done so.

[10] According to Roselyn Nisha, the victim's mother the victim and one of her sisters had been playing with the Appellant in the sitting room and when she had not heard their voices for a few minutes she had looked for and found them inside the Appellant's room. She had been putting the other daughter to sleep in the adjoining bedroom. She had seen the inside of the Appellant's room through an opening on the panel between her bedroom and the Appellant's bedroom. There had been enough light inside the room and she had had an unobstructed view. Roselyn had seen the victim lying on the bed and the Appellant on top of her having sex. Her daughter's panty and the Appellant's short trousers had been down to their knees. She had first called her husband's brother Rohan and asked him to see what the Appellant was doing. Then she had called the victim, taken her to her bedroom and examined her. The victim's

panty had been wet and when Roselyn had put her finger to the victim's vagina she had found sperm inside. The victim had told the mother that the Appellant had been having sex with her. Roselyn had later told her husband about what she had seen. The Appellant had suggested in cross-examination that Roselyn had framed him because he had stopped supporting her family financially which Roselyn had denied. She had said that she would have killed the Appellant had she had a knife in the house when she saw the incident.

[11] Dr. Sulu Sadranu had examined the victim at 8.10 p.m. on the date of the incident and his findings had been that the victim's vagina had been open and gaping and her hymen had been impaired with redness around the vagina. According to the medical evidence there had been penetration of the vagina with a blunt object which could be the penis. The doctor had ruled out bike riding or horse riding as the cause for the hymen having been impaired under cross-examination.

[12] Police Officer Clifford Waqabaca had examined the place of the incident and made a sketch of it that was marked at the trial. He had observed the opening spoken to by Roselyn. He had found it to be a crack on the wall separating the two bedrooms through which he could have a clear view of the bed where the offence had taken place.

[13] The Appellant had elected to give evidence and had said that the victim and her sister were lying on his bed watching video clips on his mobile phone. He too had been lying on the bed. After a while Rohan, a brother of victim's father had questioned him from outside as to what he was doing. After that Roselyn had pushed the door and dragged the victim away. He had seen the victim crying and on being questioned she had said that Roselyn had administered a beating on her. After that Sanjaya, the victim's father had come and threatened to kill him if he would not move out of their house. The gist of his evidence is that Roselyn had framed him because she had earlier wanted him to move out of their house and he said that there was no problem between him and the victim. Under cross-examination the Appellant had admitted that there was a curtain in his room and that he had not confronted Roselyn or the victim about the alleged beating when they gave evidence.

[14] Neither party had sought re-directions at the end of the case though specifically requested by the Learned Trial Judge. However, all three grounds of appeal relate to alleged errors or omissions in the directions by the Learned Trial Judge. Not for the first time, I wish to reiterate the following observations in this regard.

[15] The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in stronger terms in **Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17. Needless to say that when such grounds of appeal are raised the appellate courts have to spend considerable time in dealing with them which they could otherwise devote to the real issues involved in the culpability or otherwise of the appellants.

[16] Thus, the appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, they would in appeal not look at the complaints against the summing-up based on such alleged errors in the directions favorably. If the omission had been done deliberately to find a ground of appeal the appellate courts would be very stringent in entertaining such grounds of appeal.

[17] However, given the duty cast on the Court of Appeal under section 23(1) (a) of the Court of Appeal Act in determining an appeal, I would not go so far as to say that a ground of appeal based on such a complaint which could have been addressed at the trial stage should necessarily be rejected out of hand due to such an omission but given the regularity with which such grounds are urged in appeals, I am constrained to say that the appellate courts would be extremely slow to entertain such grounds of appeal and chances of them succeeding would be slender. Moreover, if these words of judicial caution are repeatedly observed in the breach as it seems to be happening at present, the day will come when the aggrieved parties start questioning and holding counsel answerable and accountable for professional negligence and incompetence.

[18] Nevertheless, in absolute fairness to the Appellant I would now proceed to consider the grounds of appeal.

Ground 1

> *'The learned Trial Judge erred in law and in fact when he did not direct himself and the assessors that the prosecution witness no. 2 would have implicated the Appellant in avenge.'*

[19] The Appellant had drawn the attention of this Court to the following paragraphs in the summing up in support of his argument.

> *'The second witness for the prosecution was the victim's mother. The accused was her husband's step-brother. The accused was staying in her house for almost two years. On 9.3.2014 she was making her younger daughter to go to sleep as she was very sick. The accused was playing with the other two kids in the sitting room. When she did not hear the voice of them for few minutes she became suspicious. When she checked the accused's room the accused was having sex with the victim. She had peeped through a small hole in the Masonite wall between the two rooms. The accused was on top of the victim having sex. She felt very bad. She had called her husband's brother Rohan. She had told him to see what his brother is doing. Then she had called her daughter to her room and asked her to take off the clothes. Her panty was wet. When she put her finger into her vagina she found sperms inside. The victim had told her that the accused was having sex with her. She had called her husband and told him what she saw.'*
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> *'Under cross examination she admitted that the accused supported her husband financially when asked by her husband. She denied that this allegation was made after accused stopped giving money. She admitted that when she saw this she called Rohan without helping her daughter. When he called Rohan he was coming to the wash room. She said if she had a knife she would have chopped the accused at that time.'*
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> *'In assessing her evidence you have to keep in mind that she is the mother of the victim. If you believe her evidence beyond reasonable doubt then there is evidence of recent complaint. You have to decide whether her evidence confirms the evidence of the victim.'(emphasis added)*

[20] The Learned High Court Judge also directed the assessors as follows.

> *'The accused gave evidence. He stated that he wanted to prove himself that he is not guilty. He was living in complainant's house for two years since 2012 on rent. He said that he was not talking to the brother Sanjay. He said that he enters his room through window not to disturb others. There were defects in his room earlier but he had repaired those. His sister-in-law was not happy since he came. As there were only two bed rooms, why her husband had given it on rent to earn some money. When husband was away complainant used to fight with him. She was saying that she will do something for me to move out.' (emphasis added)*

[21] If the counsel for the Appellant had felt that what the Trial Judge had said of the possible motive for falsely implicating him by Roselyn was insufficient that could have been easily brought to the notice of the Judge and sought a re-direction. The Appellant's counsel had failed to do so. It is now being agitated as a ground of appeal.

[22] Coming back to the Appellant's complaint, I find that the Trial Judge had addressed his mind to his contention that he had been falsely implicated by the victim's mother who had allegedly wanted him out of their house in his judgment dated 20 August 2014. Therefore, I am of the view that given that the assessors had heard the Appellant's version on the possible motive for framing him and the Trial Judge's direction that in assessing Roselyn's evidence the assessors have to keep in mind that she is the mother of the victim is enough to caution them to be alive to the allegation of a sinister motive on her part. However, as remarked by the Trial Judge in his judgment the assessors have rejected the Appellant's version. The highly unlikely scenario of the mother having brought a false accusation of rape of the daughter just to force the Appellant out of their house coupled with strong medical evidence suggestive of an act of sexual intercourse would have left the assessors in no doubt as to how they should evaluate and what weight they could attach to the Appellant's position of avenge on the part of the mother. The Trial Judge as the ultimate decision maker has also given his mind to that aspect. I cannot say that that in the present case the summing up lacks those essential qualities of objectivity, evenhandedness and balance required to ensure a fair trial (see **Chand v State** AAU112.2013: 30 November 2017 [2017] FJCA 139 for a detailed discussion on such requirements). The Appellant's complaint should end there.

[23] Therefore, I conclude that there is no merit in Ground 01 of the appeal and there has not been any miscarriage of justice (vide section 23(1) (a) of the Court of Appeal Act). I reject it.

Ground 2

'The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that the opinion and evidence given by the doctor does not confirm the guilt of the Appellant.'

[24] The Trial Judge had addressed the assessors on medical evidence as follows.

> *'The next witness for the prosecution was Doctor. She had examined the victim on 9.3.2014. In short history she had stated her uncle put his long thing in her and took it out. The patient was found by mom with uncle having sex in the bed room. The patient was calm and cooperative. Her vagina was open and gaping. Hymen was not intact. There was redness around the vagina. Her findings are consistent with history. Evidence of penetration of vagina with blunt object was present. The blunt object could be penis. She tendered the Medical report marked PE1.*
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> *Under cross examination she admitted that she expect bruising in the perennial area as the examination was done on the same day. There were no signs of struggle. She admitted that a pediatrician or gynecologist could have been a better person to do this examination. But such doctors are not available at Sigatoka hospital. A scan was done as child complained of abdominal pain. Nothing was detected from scan. She could not tell when the hymen became not intact.*
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> *The Doctor is an independent witness. She had examined the victim on the same day. She had observed the redness around vagina. Her vagina was open and gaping. Hymen was not intact. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.'(emphasis added)*

[25] The Appellant does not criticize what the Trial Judge had told the assessors as quoted above. His complaint is that the Trial Judge should have gone further and informed the assessors that the medical evidence may confirm the victim's evidence but does not confirm his guilt. I do not agree.

[26] It is clear that the doctor's evidence relates to the medical findings of the victim. What the Trial Judge had stated regarding the short history recorded in the Medical Examination Form had already been spoken to by the victim and Roselyn before the doctor gave evidence. The identity of the Appellant was not in issue in the case and he himself had admitted that he was lying on the bed along with the victim at the relevant time. Therefore, there is no way that the assessors could have been misled into believing that medical evidence may or may not confirm anything other than the act of sexual intercourse.

[27] Medical evidence may confirm or rebut an allegation of sexual intercourse but in certain cases could simply be inconclusive of either. For e.g. while positive medical evidence on penetration would be corroborative of the victim's allegation of sexual intercourse, lack of it does not necessarily mean that no penetration had occurred. Similarly, attendant injuries may suggest lack of consent, but want of them is not necessarily suggestive of the contrary. It all depends on the facts and circumstances of the case.

[28] The following direction of the Trial Judge as to how the assessors should evaluate medical evidence, in my view, put the Appellant's above ground of appeal to rest.

> *'The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us her conclusion or opinion based on examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.'*

[29] Therefore, I conclude that there is no merit in Ground 02 of the appeal and there has not been any miscarriage of justice (vide section 23(1) (a) of the Court of Appeal Act). I reject the second ground of appeal.

Ground 3

'The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that there may be more than one operative cause for the hymen not to be intact.'

[30] The only reference to this contention is in the following questions and answers given by the doctor under cross-examination.

'Q: You mention that hymen is not intact?

A: Yes.'

Q: Hymen not been (sic) intact could be due to bike riding or horse riding?

A: No.'

[31] The Appellant had not elicited at the trial as to whether the victim had indulged in any such activity that could impair her hymen. It remains a mere hypothesis. A trial judge's summing up is not an academic exercise. Neither is the court house an academy of law. The trial judge would address the assessors only on the evidence before him and them and not on surmise or conjecture. In the circumstances there was no reason whatsoever for the Trial Judge to direct the assessors that there could be other reasons other than penetration with a penis for the victim's hymen to be not-intact given the evidence of the victim, her mother and the doctor. In my view the directions to the assessors as quoted above on medical evidence are more than enough in this case.

[32] **Vakanitoga v State** CAV0042 of 2016: 20 July 2017 [2017] FJSC 18 the Supreme Court faced with a somewhat similar argument said as follows.

> '[29] The Court of Appeal dealt with this question in detail and stated as follows:
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> *"[19] The medical evidence is unchallenged. That evidence is that the hymen of the victim is not intact. At the time of giving evidence the victim was 14 years of age. There is no evidence of the victim associating with any males. The only man with whom she had had sex with was her own father. The medical opinion for the hymen not to be intact is due to vaginal penetration. That is due to having had sex with someone. The doctor cannot say who that someone is. The victim's evidence is that it is the father. Although it was suggested to the doctor that a girl of the age of the victim can lose the hymen due to vigorous sports activity, there is no such evidence. It is true that the learned judge had failed to analyse the evidence and explain that the Assessors are not bound by the opinion of the doctor that the losing of the hymen was due to vaginal penetration. The learned Judge said to the Assessors that they are Judges of facts. He also said that if an opinion had been expressed by him with regard to facts, that the Assessors are not obliged to accept it. The Assessors were told that they have to consider all the evidence and decide. It appears that there is no strict rule to say that the trial Judge is bound to tell the Assessors that they are not bound to follow the opinion of the doctor. It was held in* ***Fitzpatrick*** *[1999] Crim. L. R. 832 that a failure slavishly to follow this formula does not automatically render a conviction unsafe. In this case I am of the view that it would have been better if the Judge said to the Assessors that they are not bound by the opinion expressed by the doctor that the reason for the hymen not to be intact is due to vaginal penetration. In addition to the opinion expressed by the doctor the vaginal penetration has been established through the evidence of the victim and the grandmother. Therefore not giving a warning that the Assessors are not bound to follow the opinion of the doctor cannot be considered as fatal. However by considering the fact that the evidence led was short and it not being a complex case, no prejudice was caused and no miscarriage of justice has occurred."(emphasis added)*

[33] Therefore, I conclude that there is no merit in Ground 03 of the appeal. I reject the third ground of appeal.

[34] In the circumstances, I would conclude that the appeal should stand dismissed and the conviction and sentence be affirmed.

Fernando, JA

[35] I agree with the reasoning and conclusion reached by Prematilaka JA that the appeal in its entirety should be dismissed.

The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction and sentence are affirmed.*

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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 A. Fernando
JUSTICE OF APPEAL