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

CRIMINAL APPEAL NO.AAU 0055 of 2018
[In the High Court at Suva Case No. HAC 202 of 2016S]

BETWEEN	:	**GOVIND SAMI RAJU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Kant and Mr. D. Nair for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**23 November 2020**
Date of Ruling	:	**24 November 2020**

RULING

[1] The appellant, aged 85 at the time of the offence, had been indicted in the High Court of Suva on two counts of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 and another count of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 committed at Nasinu in the Central Division on a 11 year old female child.

[2] The information read as follows.

'First Count

Statement of Offence

RAPE: contrary to Section 207(1) and (2)(a) and (3) of the Crimes Act of 2009.

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Particulars of Offence

GOVIND SAMI RAJU between the 1st day of May 2016 and the 31st day of May 2016 at Nasinu in the Central Division had carnal knowledge of R. R. C, an 11 year old girl.

Second Count

Statement of Offence

RAPE: Contrary to Section 207(1) and (2)(a) and (3) of the Crimes Act of 2009.

Particulars of Offence

GOVIND SAMI RAJU between the 1st day of May 2016 and the 31st day of May 2016 at Nasinu in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of R. R. C, an 11 year old girl.

Third Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210(1)(a) of the Crimes Act of 2009.

Particulars of Offence

GOVIND SAMI RAJU on the 19th day of April 2016 at Nasinu in the Central Division unlawfully and indecently assaulted R. R. C, an 11 year old girl, by kissing her lips.

[3] At the conclusion of the summing-up on 05 June 2018 the assessors' opinion had been as follows. The three assessors returned with mixed opinions. Assessor No. 01 had found the appellant not guilty on all counts. Assessor No. 02 had found the appellant guilty on the first and third counts, but not guilty on the second count. Assessor No. 03 had found the appellant guilty on the first and second counts but not guilty on the third count.

[4] Thus, three assessors' opinion could be summarized as follows. The majority had found the appellant guilty on the first count (*i.e.* assessors No. 2 and 3), not guilty of the second count (*i.e.* assessors No. 1 and 2) and the third count (*i.e.* assessors No. 1 and 3).

[5] The learned trial judge had agreed with the assessors in his judgment delivered on 06 June 2018, convicted the appellant of the first count of rape and acquitted him of the other two counts. On 07 June 2018 the trial judge sentenced him to 10 years of imprisonment subject to a non-parole period of 07 years.

[6] The appellant's lawyers Pacific Chambers had filed a timely notice of appeal against conviction and sentence on 15 June 2018. After change of solicitors on 10 July 2019, Sairav Law had filed written submissions on 01 September 2020. The state had tendered its written submissions on 05 October 2020.

[7] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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) 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.

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[9] Grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows.

Conviction

Ground 1 ***THAT*** *the learned Judge erred in law and in fact when he failed to direct the assessors on the defence case theory regarding motive.*

Ground 2 ***THAT*** *the learned trial Judge erred in law and in fact when he failed to take into account the reasonable doubt that had been raised by the defence during cross examination of the prosecution witnesses, especially the complainant given that this was a case which heavily relied on her testimony and credibility.*

Ground 3 ***THAT*** *the learned trial Judge erred in law and in fact when he failed to properly evaluate the medical testimony of all three Doctors in regards to evidence about the complainants hymen still being intact, resulting in a grave miscarriage of justice.*

Ground 4 ***THAT*** *the learned trial Judge erred in law and in fact when he failed to take into account that the Appellant age of 85 years at the time of the offence and that he cannot sustain an erection given his heart condition, diabetes and prostate. As such given the Appellant could not have raped the Complainant.*

Ground 5 - ***THAT*** *the learned trial Judge erred in law and in fact when he failed to direct the assessors about the credibility of the prosecution witnesses in particular Gita Reddy and the bias of Dr. Annette Naigulevu.*

Ground 6 - ***THAT*** *the learned trial Judge erred in law and in fact when he failed to give sufficient time for closing addresses so that Defence Counsel could thoroughly canvass all the relevant points to the assessors.*

Ground 7 - ***THAT*** *the learned trial Judge erred in law and in fact when he failed to give counsel sufficient time to mitigate for Accused after declaring him guilty.*

Ground 8 - ***THAT*** *the learned trial Judge erred in law and in fact when he failed to direct on the credibility of witnesses and reasonable doubt raised during cross examination.*

Sentence

*Ground 1- **THAT** the learned Trial Judge erred in law and fact when he failed to give counsel sufficient time to mitigate and give sentencing submissions.*

*Ground 2 - **THAT** the Learned Trial Judge erred in law and fact when he failed to take into account other case authorities that had similar facts where the Accused got a lesser non-parole period (State v Daunakamakama ; HAC 137/17 sentenced on 18th April, 2018 to 1yr imprisonment, non-parole period of 5 years).*

*Ground 3- **THAT** the Learned Trial Judge erred in law and fact when he failed to take into consideration the Accused personal circumstances like his advanced age, ill health and the effect that a long non-parole period will have on the Appellant.*

[10] At the hearing into leave to appeal the appellant's counsel abandoned and/or withdrew the third ground of appeal.

[11] The learned trial judge had summarized the evidence led by the prosecution in the summing-up as follows.

19. According to the prosecution, in April and May 2016, the complainant (PW1) and her family were renting an upstairs flat from the Accused. The accused owned a two story flat, and the complainant's family occupied the top flat. The accused also occupied a top flat adjacent to the complainant's family's flat. The flat is located at 10 Miles Nasinu. According to the prosecution, the complainant's family had been renting the flat since December 2015. The Fiji Muslim League pays PW1's family's rental of $250 per month. According to the prosecution, PW1's mother (PW4) works at a restaurant as a cook from 4 pm to 10 pm daily to support her family. When she is not at home, PW1 often looks after her other siblings.

20. On 19 April 2016, the complainant (PW1) was looking after her two young sisters at home. According to the prosecution, her mother was away at a mosque. According to the prosecution, the accused allegedly called PW1 to his bedroom to make up his bed. PW1 allegedly obliged and made up the accused's bed. According to the prosecution, the accused then allegedly held PW1's head, and brought her mouth towards his mouth, and allegedly kissed her on the lips for about 10 seconds. The accused then allegedly warned PW1 not to tell anyone about the incident (count no. 3). Sometime in May 2016, according to the prosecution, the accused allegedly called PW1 to his bedroom. PW1's mother was at work and she was looking after her sisters. PW1 allegedly went to the accused's bedroom. According to the prosecution, the accused allegedly took off PW1's clothes, pusher her onto his bed, parted her legs and allegedly inserted his penis into her vagina for about 10 seconds. After having sex with PW1, the accused allegedly warned her not to tell

anyone about the incident, otherwise he will throw them out of his house (count no. 1).

21. Following the above incident, the accused again allegedly repeated the above incident to PW1 in his bedroom in May 2016. He allegedly called her to his bedroom, removed her clothes, laid her on his bed and inserted his penis into her vagina for about 10 seconds. He later warned her not to tell anyone about the incident, or he will throw her family out of his house (count no. 2). However, PW1 later revealed the incident to an aunty and the matter was reported to police. An investigation was carried out. The accused appeared in the Nasinu Magistrate Court on 31 May 2016 charged with raping and sexually assaulting PW1. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on all counts. That was the case for the prosecution.

[12] In addition, paragraph 29 of the summing-up reveals that the victim had also stated in her evidence that she had bled from her vagina and it was painful. She had seen some milky substance come out of the appellant's penis and the appellant had wiped his penis and her vagina with a piece of cloth.

[13] The victim had been examined by Dr. Annette Naigulevu on 27 May 2016 and she had seen two small tear or superficial laceration at the victim's hymeneal membrane and also redness around the area and according to the doctor, the above findings were suggestive of penetration into the vagina. Doctor Naigulevu had said that her findings showed the possible penetration of PW1's vagina within 48 to 72 hours prior to her examination. According to the doctor, if the victim had bled from the vagina at the time of the alleged incident and that it was painful to her, those signs had indicated that something was penetrating her vagina at that time. Doctor Naigulevu had also said that because the vagina had a rapid regenerative ability due to numerous blood vessels, any injury to the vagina could appear normal after 48 to 72 hours and when the victim was examined on 31 May 2016 the vagina could look normal. She had also stated that in some cases when a penis penetrates the vagina, the hymen could still be intact in pre-puberty girls such as the victim.

[14] Doctor Fortuno had examined the victim four days later *i.e.* 31 May 2016 under anesthesia and found no laceration, no pus or discharge and no bleeding. The hymen was seen all around and intact. However, he too had agreed that the children have good regenerative ability, especially around the vaginal area and if Dr. Naigulevu had

noted superficial tears on the hymeneal membrane, by the time Dr. Fortuno had examined her, there was a possibility that those tears would have healed because of the regenerative ability.

[15] There appears to have been recent complaint evidence in the form of Gita Reddy to whom the victim had complained a day after the second act of sexual intercourse. Though, her evidence could be regarded as recent complaint evidence at least as far as the last act of sexual intercourse was concerned, it is not possible to find the directions on recent complaint as articulated in **Raj v State** [2014] FJSC 12; CAV0003 of 2014 in the summing-up given by the trial judge.

[16] It appears that particularly the first, fifth and eighth grounds of appeal are based on alleged failure on the part of the learned High Court judge to direct the assessors on various aspects of the case. The respondent rightly argues that the appellant's counsel should have sought required redirections when afforded the opportunity to do so at the end of the summing-up and therefore, the appellant is now barred from raising such matters as grounds of appeal 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). I shall, however, consider those grounds of appeal subject to the state's objection.

01st ground of appeal

[17] The appellant complains that the trial judge had not placed before the assessors his evidence on possible motive to make allegations against him. He has cited **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) where the Court of Appeal having examined a number of previous judicial pronouncements, the following were identified as possible defects in a summing-up that could lead to miscarriage of justice.

> (i) The summing up not tailored to the facts and circumstances of the case.
> (ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.
> (iii) Little weight given to the strong points for the defence and a fair picture

of the defence not given to assessors *i.e.* not putting the defense fairly to the assessors.

(iv) The contentious issues put in a way favourable to the prosecution and unfavourable to the Appellant.

(v) The Judge at times appears to have usurped the fact finding function of the assessors.

(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.

[18] The trial judge had devoted the following paragraphs to the appellant's defense.

> *'23. The accused's case was very simple. On oath, he denied the complainant's (PW1) allegations against him. On oath, he said, he did not insert his penis into the complainant's vagina, at any time whatsoever. He denied the rape allegations against him in count no. 1 and 2. He also denied ever kissing the complainant (PW1), as alleged in count no. 3. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on all counts. That was the case for the defence.*
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> *35. From paragraphs 22 and 23 hereof, I summarized the accused's case to you. I repeat the same again here. On oath, he denied the complainant's three allegations against him. He said, he did not insert his penis into the complainant's vagina, at any time whatsoever. He said, he did not kiss the complainant as alleged in count no. 3. You have watched and heard him give evidence on 1 June 2018. You have noted his demeanour when he answered the questions levelled at him. He called three witnesses to give supporting evidence. If you find the accused's sworn evidence credible, and you accept the same, you must find the accused not guilty as charged on all counts. If otherwise, you will still have to assess the strength of the prosecution's case, and make a decision accordingly. It is a matter entirely for you.'*
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> *38. The defence called 4 witnesses:(i) The Accused (DW1);(ii) Mr. A. Kumar (DW2);(iii) Ms. S. Singh (DW3); and (iv) Doctor L. Lutuavatuvakarauvanua (DW4)*
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> *39. The defence tendered four exhibits: (i) Notice to Vacate Accused's Property - Defence Exhibit No. 1,(ii) DW2's letter to Police - Defence Exhibit No. 2, (iii) DW4's 1.6.16 letter to Accused - Defence Exhibit No. 3, (iv) Sketch of male Reproductive Organ - Defence Exhibit No. 4*

[19] Even in the judgment in agreeing with majority of assessors, the only thing the judge had stated with regard to the appellant's evidence is that he rejected the appellant's denial on the first count without giving reasons which the appellant had criticized as

an error of law in terms of **Lautabui v State** [2009] FJSC 7; CAV0024 of 2008 (06 February 2009). ***Lautabui***, however, is a case where the trial judge had disagreed with the majority of assessors and thus, not applicable to the appellant's case. Similarly, the trial judge had also not stated whether he believed the appellant's denials while agreeing with the majority of assessors on count 2 and 3 in acquitting the appellant of those two charges.

[20] In my view, the trial judge had adequately performed his role in agreeing with the assessors in the judgment. 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 trail 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)]

[21] According to the submissions of the state, the motive that had been attributed by the appellant for the allegations against him was as an act of revenge for evicting the victim's family from their house. It is not mentioned anywhere as to what the other witnesses for the appellant had testified to before court. There appears to be substance in the appellant's submission that the trial judge had not referred in the summing-up or the judgment to the motive that he had suggested and to the evidence of his other witnesses.

[22] It looks to me, however, that the overall summing-up suffers from not being well-rounded and balanced where both versions are reflected in equal measure before the assessors. Even the judgment has no mention of what the appellant and his witnesses at the trial had stated except his denial. I have doubts whether the trial judge's address

to the assessors has measured up to the requirements set down in **Silatolu v State** [2006] FJCA 13; AAU0024 of 2003S (10 March 2006) and **Prasad v State** [2017] FJCA 112; AAU105.2013 (14 September 2017) when the appellant had given evidence and called witnesses.

[23] Therefore, I think that having considered the totality of the prosecution evidence and the defense case within section 23(1) and its proviso of the Court of Appeal Act, it is a matter for the full court to decide the final outcome of the appeal, which, unlike me, will have the benefit of the complete appeal record. In doing so the court may have regard to **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020), **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020).

03rd ground of appeal

[24] The appellant argues that the trial judge had failed to properly evaluate the medical testimony of the two doctors summoned by the prosecution. I do not agree with this proposition with regard to Dr. Annette Naigulevu and Dr. Fortuno whose evidence had been adequately dealt with in paragraphs 32 and 33 of the summing-up and at paragraphs 11 and 12 of the judgment. In my view, the judge had correctly analyzed and drawn correct conclusions from the evidence of these two doctors. This argument has no prospect of success at all.

[25] Under the same ground of appeal the appellant also argues that medical evidence, if at all, should relate to the second count of rape and not the first count of rape, as the victim had complained within a day of the last act of rape and the injuries found were aged 48-72 hours from the first medical examination .

[26] It is unclear as to why the DPP had preferred two identical counts of rape against the appellant. The trial judge had said in the judgment that they were representative counts. The parties are unable to verify it. If that is the case, there was no reason to have two identical counts, as one representative count would have covered the period

from 01 May 2016 to 31 May 2016 and the prosecution had to prove only one act of sexual intercourse during that period.

[27] Therefore, it is also not clear whether it is count 1 or count 2 that relate to the second act of sexual intercourse where the victim complained to her aunt and then reported the matter to the police and the medical examinations followed. Obviously, the assessors seem to have acted on the premise that the first count relates to the most recent incident followed by the other two counts going back in timeline in reverse chronological order, because the count of sexual assault that had allegedly occurred on 19 April 2016 was the third count in the information.

[28] In the judgment the trial judge too appears to have followed the same line of thinking as the medical evidence corroborates the most recent act of sexual intercourse which then is the first count. Therefore, the trial judge's decision to agree with the opinion of the majority of assessors that the appellant was guilty of count 01 could be rationally understood.

[29] However, it is not surprising to see the trial judge having commented in the judgment as follows on the unwarranted confusion which originates from the information itself.

> *'14. On count no. 2 and 3, the majority of the assessors rejected the prosecution's version of events. I have looked at the whole of the evidence. In my view the prosecution's case was not presented properly. It caused me confusion, especially when differentiating the facts for count no. 1 and 2. On count no. 3, PW2's evidence was suspect. I was thrown into a reasonable doubt on the prosecution's case. I agree with the majority opinion of the assessors on count no. 2 and 3, and find the accused not guilty as charged on count no. 2 and 3. I acquit the accused on count no. 2 and 3.'*

04th ground of appeal

[30] The appellant criticises the trial judge for not having considered the question whether the appellant could have sustained an erection at the age of 85 years in the light of the medical evidence.

[31] It is true, that there is not a word of what Dr. L. Vakarauvanua (DW4) called by the appellant had said in his evidence in the summing-up or the judgment. The respondent had summarised her evidence in its written submissions. According to the state's

submissions this doctor had confirmed that the appellant appeared to be suffering from diabetes, and benign prostatic hyperplasia but none of them necessarily led to erectile dysfunction. She had also said that even at 85 years of age a man still has a sex drive, and even with diabetes could typically still get an erection, albeit some 40-50% less often than a man aged 20. If this is what the doctor had said then obviously, it would not have helped the appellant much in his defence. On the other hand, it cannot be ascertained whether the appellant himself had said in his evidence that he was unable to get an erection. If not, the medical evidence would be of little value anyway.

[32] Nevertheless, I agree with the appellant's submission that Dr. L. Vakarauvanua's evidence should not have been completely omitted from the summing-up or in the judgment.

[33] This aspect also could be looked into by the full court along with the first ground of appeal with the assistance of the full appeal record to see the impact of Dr. L. Vakarauvanua's evidence *vis-à-vis* the conviction in the context of section 23(1) and its proviso of the Court of Appeal Act.

05th and 08th grounds of appeal

[34] It is noteworthy to mention that the written submissions of the appellant under both grounds of appeal are identical. Not only these grounds of appeal are vague and formulated in general terms but they have not been elaborated or substantiated with any details even in written submissions. The appellant has not demonstrated as to how the trial judge had failed to direct the assessors on the credibility of the prosecution witnesses and in particular Gita Reddy and not commented on allegedly biased evidence of Dr. Annette Naguilevu or how a reasonable doubt had arisen in cross-examination of prosecution witnesses.

[35] I had the occasion to remark in **Vunisea v Fiji Independent Commission Against Corruption** - Ruling [2020] FJCA 169; AAU98.2018 (16 September 2020) and **Vunisea v Fiji Independent Commission Against Corruption** [2020] FJCA 170; AAU98.2018 (16 September 2020) on a similar situation as follows.

'[10] It is clear that the appellant's grounds of appeal have been framed in very general terms. The written submissions also render very little help in that regard as they lack elaboration and sufficient details. In ***Rauqe v State*** *[2020] FJCA 43; AAU61.2016 (21 April 2020) the Court of Appeal remarked as follows [see also* ***Kishore v State*** *[2020] FJCA 70; AAU121.2017 (5 June 2020)] on framing of appeal grounds.*

> ***'****[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in* ***Gonevou v State*** *[2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said*
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> *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

[11] Similar observations were earlier made in the case of ***Rokodreu v State*** *[2016] FJCA 102; AAU0139.2014 (5 August 2016) by Goundar J. as follows.*

> ***'****[4] I have read the appellant's written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*
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> *[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing better particulars of the alleged complaints in the summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.'*

[36] Therefore, these two grounds are frivolous and vexatious. The counsel who had drafted these grounds of appeal and who had filed written submissions are equally guilty of not having measured up to their professional responsibilities.

06th and 07th grounds of appeal

[37] There are two complaints on the part of the appellant. Firstly, he states that his trial counsel was not given sufficient time to prepare for closing addresses so that he could thoroughly canvass all the relevant points before the assessors. Secondly, he states that the trial counsel was not given sufficient time to mitigate on his behalf in the matter of sentence.

[38] There is absolutely no material before me at this stage to buttress any of the above complaints. The summing-up, the judgment or the sentencing order does not indicate that there had been any application seeking more time but it had been was refused by the trial judge.

[39] In any event, the trial had lasted only for 05 days from 29 May to 04 June 2018. The trial counsel should have been competent enough to make his closing address soon after the evidence for the defense was over. It is part of the professional responsibility and competency of any trial counsel to keep records of daily proceedings and be ready for the closing address unless the case is of unusual complexity. The prosecution too had the same time to prepare for its closing address.

[40] The same goes for the mitigating submissions. It is clear that the defense had already led some evidence of the appellant's medical history and even called a doctor to give evidence. Therefore, any material on his medical condition should have been readily available to the defense counsel during the course of the trial and no fresh material would have been permitted thereafter even for mitigation.

[41] At this stage there two grounds of appeal appear to be frivolous and vexatious.

09th ground of appeal

[42] This is the same as the appellant's 07th ground of appeal and even the submissions is the same. I have already dealt with the lack of prospect of success of this complaint. At this stage this ground of appeal is frivolous and vexatious and demonstrates only the callous attitude paid to drafting grounds of appeal by counsel by repeating same grounds of appeal.

10th and 11th grounds of appeal

[43] The gist of these grounds of appeal is that the appellant should have been given a lesser non-parole period. The trial judge had picked the starting point at the lower end of 10 years set for the tariff for juvenile rape [*i.e.* between 10-16 years of imprisonment in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. He had added only 03 years for very serious aggravating factors and considered the mitigating factors of the appellant's age and remand period of 02 months. However, 03 months had been deducted on account of the period of remand and 02 years and 09 months for the appellant's advanced age of 87 years. The trial judge had also imposed a non-parole period of 07 years on the final sentence of 10 years which is at the lower end of the tariff for the rape of 11 years old victim.

[44] In **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002) cited by the appellant, a man of 64 years, who had faced 09 charges of sexual assault under the Penal Code had pleaded guilty and been sentenced to 10 years of imprisonment which was reduced to 05 years by the High Court as it was thought that 10 years was excessive taking into account the age of the appellant. ***Rokota*** had adopted the common law principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released. The case has no reference to a non-parole period at all. Therefore, it is clear that the circumstances in ***Rokota*** where the challenge was to the main sentence, had been decided 18 years ago and the current sentencing regimes are completely different to that of ***Rokota's*** time. Yet, like in ***Rokota*** the trial judge had taken into account the appellant's age and given a discount of 02 years and 09 months in the matter of the main sentence.

[45] In **State v Daunakamakama** - Sentence [2018] FJHC 297; HAC137.2017 (18 April 2018) relied on by the appellant, a sentence of 11 years was imposed on the accused, 83 years of age, on four rape charges of two female victims of 12 and 10 years old and the trial judge had considered the common law principle expressed in ***Rokota*** that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released in giving a discount of 02 years due to the advanced age of the accused in the matter of the principle sentence. However, the trial judge had not even referred to the said principle in imposing the non-parole period of 06 years but considered several other factors which, of course, included his old age.

[46] There has been an alarming and steady increase of instances child rape by the elderly over the years in Fiji and courts have had to impose tougher sentences and set equally deterrent sentencing tariffs in an attempt to combat this menace. The appellant has not challenged the principle sentence as he had been given the minimum possible sentence for child rape due to his age.

[47] The common law principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released, should now be considered in the context of completely different sentencing principles and guideline judgments currently being applied on sentencing in child rape cases.

[48] However, the appellant has not demonstrated any statutory provision or binding judicial authority supportive of his attempt to import the same common law principle to the imposition of non-parole periods.

[49] Therefore, the trial judge cannot be said to have committed a sentencing error which has a reasonable prospect of success in appeal. Nevertheless, I think whether or not the common law principle that a sentence imposed on offenders (of advanced age or similar cause) should normally be shortened so as to avoid the possibility that the offender will not live to be released, should be equally applied in fixing the non-parole period is a question of law. Therefore, I would grant leave to appeal on that question of law to the full court regarding the non-parole period imposed on the appellant.

Order

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL