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

CRIMINAL APPEAL NO.AAU 121 of 2017
[High Court Lautoka Criminal Case No. HAC 70 of 2015]

BETWEEN	:	**NAND KISHORE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. I. Khan for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**01 June 2020**
Date of Ruling	:	**05 June 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2)(b) and (3) of the Crimes Decree No.44 of 2009. The particulars of the offence were that:

> *'FIRST COUNT*
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***NAND KISHORE****, on the 22nd day of April 2015 at Elevuka, Ba, in the Western Division, penetrated the vagina of KV, a child under the age of 13 years, with his finger.'*

[2] After full trial, on 21 July 2017 the three assessors had expressed a unanimous opinion of guilty against the appellant on the count of rape. The learned High Court judge in the judgment dated 25 July 2017 had agreed with the assessors and convicted him of the count of rape. He was sentenced on 28 July 2017 to imprisonment of 11 years and 9 ½ months with a non-parole period of 09 years.

[3] Timely notice of appeal against conviction and sentence had been filed on 24 August 2017. Written submissions on behalf of the appellant had been tendered on 24 May 2019 and the State had filed its written submissions on 21 February 2010. At the hearing of the leave to appeal application the counsel for the appellant indicated that the appellant would not proceed with his appeal against sentence and accordingly, the appellant filed an application for the abandonment of the appeal against sentence in Form 3 of the Court of Appeal Rules. The counsel for the appellant also informed court that he would rely on his written submissions.

[4] The evidence against the appellant had been summarised by the learned trial judge in the sentencing order as follows.

[5] The victim was 8 years old at the time of the offence. On the day in question, she had come back from school and gone outside home to play with her two sisters. The appellant, aged 61, was renovating the landlord's house in the adjoining compound and called the children to pour water on cement. Victim's mother had sent her and her sisters to help the appellant who had then gone inside landlord's house and asked the victim to pick rubbish in the room. The victim had gone into the room, but there was no rubbish. The appellant had quickly closed all the windows of the room and told the victim to bend down and look properly. When she bent down, he had pulled her shorts and poked her vagina with his finger. She had screamed when she felt pain. She had got frightened. She had pulled up her shorts and run outside. Then within a short time she had divulged the matter to her mother. The doctor who examined the victim had observed redness around her vaginal area and found her hymen not to be intact. In the cautioned interview, the appellant had admitted penetrating victim's vagina with his finger.

[6] The appellant had completely denied the allegation against him that he penetrated the victim's vagina with his finger but admitted that he was doing renovation work on 22nd April 2015 at the victim's landlord's house while denying calling the complainant and her sisters to assist his work.

[7] The appellant had further stated that he was neither given the cautioned statement for him to read nor was it read back to him. He had stated that that he told the police officers that he could only speak and understand Hindi but could not write or read. He had denied the signature appearing in the original cautioned statement and disputed the content of the cautioned statement and the charge statement.

[8] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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 **Waqusaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

Grounds of Appeal

Against Conviction

*1. **THAT** the Learned Trial Judge erred in law and in fact in not conducting a competency test and to determine before the complainant who was a juvenile witness gave evidence whether she could give sworn evidence. There is no indication in this case that the learned trial Judge conducted such a test. The failure to do so caused a substantial miscarriage of justice.*

*2. **THE** Learned Judge erred in law and in fact in not adequately / sufficiently/ referring/ directing/considering himself or the Assessors the Medical Report of the Complainant. That such failure by the Learned Trial Judge caused a substantial miscarriage of justice.*

3. ***THE*** *Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE. There was a substantial miscarriage of justice by the Learned Trial Judge when he came to a decision in upholding the guilty verdict of the Assessors when he failed to adequately analyze all the facts before himself.*

4. ***THE*** *Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE. Such error of the Learned Trial Judge in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe and unsatisfactory giving rise to a grave miscarriage of justice.*

5. ***THE*** *Learned Trial Judge erred in law and in fact in not directing himself and/or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

6. ***THAT*** *the Learned Trial Judge erred in law and in fact when he stated that* ***"You watched the Accused giving evidence in court. You can expect any person accused of a crime to give an innocent self-serving version generally to escape criminal liability. However, you must evaluate the evidence of the Accused in light of the evidence led in this particular trial and be satisfied that he told the truth".*** *Such comment* ***"to escape criminal liability"*** *caused a substantial miscarriage of justice.*

[9] In the written submissions the appellant's counsel has not elaborated on any of the grounds of appeal except the fifth ground of appeal. It merely reiterates the grounds of appeal set out in the notice of appeal and states the law relating to leave to appeal.

1st ground of appeal

[10] The State has submitted that the learned trial judge found the complainant who was 08 years of age to be a competent and compellable witness and that the trial judge must have inquired into the competency of the victim as a witness.

[11] In the absence of the full appeal record, I am unable to verify whether there is any weight to the appellant's complaint. Nor can I find out whether there was any objection raised at the trial by the counsel appearing for the appellant as to the competency of the victim to give evidence. In the recent past the Court of Appeal examined in detail *inter alia* the legal framework of a competency test in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018) and it is only with the benefit of the appeal record this ground of appeal could be examined in the light of ***Alfaaz.***

2nd ground of appeal

[12] It appears that the learned trial judge did address the assessors on the medical evidence in the summing-up as follows.

> *'51. Prosecution called doctor Siteri to give expert evidence. She is a MMBS qualified doctor with six years' experience. She was attached to the Nailaga Health Center of the Ba Mission Hospital. She conducted the medical examination on the Complainant on 22nd April, 2015.*
>
> *52. Doctor had observed redness around Complainant's vaginal area and found her hymen not intact. Doctor said that her medical findings were consistent with vaginal penetration by a blunt object. Under cross examination, doctor did not rule out that horse riding and playing gymnastic could cause hymen to be not intact.'*

[13] In paragraph 16 of the judgment the learned trial judge had stated

> *'Prosecution also relies on doctor's medical finding to prove the credibility of the Complainant's version. Doctor had examined the Complainant within hours after the incident. Medical finding does not implicate the Accused. However, the redness around Complainant's vaginal area and the fact that her hymen not being intact are consistent with version of the Prosecution.'*

[14] Thus, this ground appeal has no merit.

3rd and 4th grounds of appeal

[15] This ground of appeal is couched in such general terms that I cannot understand what the appellant's real complaint is without any details of the alleged errors. I had the occasion to remark on this type of grounds of appeal in the recent ruling in **Rauqe v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) as follows.

> *'[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*
>
> > *'[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.'

[16] 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.*
>
> *[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.*

[17] The learned trial judge has given a detailed and complete summing-up to the assessors and his judgment is also well-considered. Due to want of sufficient details the merits of this ground of appeal cannot be considered.

5th ground of appeal

[18] The appellant's submissions have not demonstrated what possible defenses had arisen in evidence for the trial judge to place before the assessors. In fact this ground of appeal too suffers from the same deficiency of want of particulars on the alleged possible defenses. I have already dealt with this issue under the third ground of appeal. As far as the summing-up and the judgment go the appellant's only defense had been one of complete denial. Due to want of sufficient details the merits of this ground of appeal too cannot be considered.

6th ground of appeal

[19] The appellant's complaint is based on paragraph 69 of the summing-up. I agree that the sentence *'You can expect any person accused of a crime to give an innocent self-serving version generally to escape criminal liability'* is unwarranted and any expressions with similar connotations should be avoided by trial judges at all times. However, in the light of the overwhelming evidence against the appellant and considering the summing-up in its totality, I am not convinced that the impugned utterance has resulted in a miscarriage of justice.

[20] Therefore, this ground of appeal does not reach the threshold of reasonable prospect of success in appeal.

[21] On the other hand it does not appear that the appellant's trial counsel had sought any redirections on the alleged non-directions or omissions in the summing-up. Therefore, the appellant is not entitled even to raise such points in 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)].

[22] In the circumstances, overall there is no reasonable prospect of success in the appellant's appeal.

[23] Accordingly, leave to appeal against conviction is refused.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL