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

CRIMINAL APPEAL NO.AAU 173 of 2017
[In the High Court at Lautoka Case No. HAC 140 of 2015]

BETWEEN	:	**PENIASI NAQAU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Kunatuba for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**11 December 2020**
Date of Ruling	:	**22 December 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on two counts of sedition contrary to section 67(1)(a) of the Crimes Act, 2009 committed with 13 others on 04 November 2014 at Sigatoka in the Western Division.

[2] The two charges read as follows.

COUNT ELEVEN

Statement of Offence

***SEDITION**: Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

PENIASI NAQAU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA

*SOVEREIGN CHRISTIAN **STATE** -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.*

COUNT EIGHT

Statement of Offence

***SEDITION**: Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

*PENIASI NAQAU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN **STATE**" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.*

[3] After the summing-up on 02 November 2017, the assessors had by a majority opinion that the appellant was guilty of count 11 and not guilty of count 12. The High Court judge had agreed with the majority of assessors on count 11 and found the appellant guilty and disagreed with the majority of assessors on count 12 and found the appellant guilty and convicted him on 09 November 2017. The appellant was sentenced to 02 years, 03 months and 11 days of imprisonment on 29 November 2017 without a non-parole period.

[4] The prosecution case could be summarized as follows. Napolioni Batimala (PW2) had testified that on 04 November 2014 he was present at Cuvu village where some people were appointed as Ministers. According to the witness names were read out and those appointed took an oath on the Holy Bible. The witness knew those who were appointed as Ministers on the day and was able to identify the appellant, Peniasi Naqau among those persons in court. His evidence mainly relates to the event of the day in issue and particularly to twelfth count. The prosecution had relied on the contents of the document headed ***"Nadroga-Navosa Sovereign Christian State Provisional Institutions of Self-Government"*** marked PE28 to prove the eleventh count. The state had also led in evidence the record of interview of the appellant in support of both counts, which according to the prosecution was made voluntarily. The appellant in his cautioned interview had stated that on 4 November

2014 he was appointed as "Minister for fisheries" but in evidence he had told court that what he told the interviewing officer was that he was only the representative for the Matanitu Vanua of Nadroga-Navosa. However, he had admitted in the cautioned interview that ***"Nadroga-Navosa Sovereign Christian State Provisional Institutions of Self-Government"*** marked PE28 was their constitution, his name was on the document and he had signed PE28 after taking an oath.

[5] The appellant's version of events could be gathered from the judgment of the trial judge in a summary form at paragraphs 43- 52.

> *102. This accused in his record of interview stated that the document headed "Nadroga Navosa Sovereign Christian State Provisional Institutions of Self-Government" was their constitution. He admitted that his name was on this document. He had signed the document (prosecution exhibit no. 28) after taking an oath although he had forgotten the oath statement.*
>
> *103. When giving evidence the 6th accused informed the court that he was to be the main representative of the fishing rights of the Matanitu Vanua of Nadroga-Navosa.*
>
> *104. The accused had signed a document after his name was called, but he said he had not seen the document that he was asked to sign. According to the witness the page where he had to sign was already open. The accused could not recall if there were any prayers done after he had signed.*
>
> *105. The accused was asked by Ratu Osea Gavidi to take up the duties for fishing rights of the Matanitu Vanua. At the time of signing the document (prosecution exhibit no. 28) the accused's intention was that this document will help the Matanitu Vanua of Nadroga-Navosa.*
>
> *106. In cross examination by State Counsel, the accused admitted that he had attended the meeting on 14th November, 2014 and remembered signing page 9 of prosecution exhibit no. 28 which was already open.*

[6] A timely notice of appeal and an application for leave to appeal against conviction and sentence had been filed by Law Solutions on 21 December 2017. Amended grounds of appeal had been tendered by the same solicitors on 11 July 2018 and the appellant's written submissions had been filed on 09 August 2018. The state had responded by way of its written submissions on 16 October 2020.

[7] In terms of section 21(1) (b) (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***

CONVICTION.

*1. **THAT** the Honourable Trial Judge erred in facts and in law when he misdirected himself in assessing that the Prosecution proved its case beyond reasonable doubt against the Appellant (6th accused in the High Court trial) that there was discontent or disaffection amongst the inhabitants of Fiji due the Appellant (6th accused's in the High Court trial) signing of the document. The Appellant had no knowledge of the document nor its content. In signing*

the document he was of the understanding that it will assist the Matanitu Vanua of Nadroga – Navosa.

2. ***THAT*** *the Honourable Trial Judge erred in law and facts when he did not undertake a proper analysis of the evidences before the Court and confirmed that the* ***element 2*** *("did an act") and* ***element 3*** *("with a seditious intention) of the said offence has been proven beyond reasonable doubt by the Prosecution before convicting and sentencing the Appellant.*

3. ***THAT*** *the Honourable Trial Judge erred in facts and law when he did not give proper weighing of the evidence produced in the Appellant's Caution Interview and oral evidence given under oath wherein he clearly expressed his intention that he was not against the current lawful government. He had stated that he signed for the Matanitu vanua o Nadroga- Navosa and he agreed to be the representative on the 'Qoliqoli , Fisheries and Fishing Rights.*

4. ***THAT*** *the Learned Trial Judge erred in law and facts when he specifically highlighted the* ***racially denoted*** *sections of the document Prosecution Exhibit 28 to give credibility to his judgment when the Appellant was not involved in any way in the planning , consultation and production of the document and could not even write and read the* ***"ENGLISH"*** *language.*

5. ***THAT*** *the learned Trial Judge erred in law and facts when he read the* ***racially derogatory*** *sections of Prosecution Exhibit 28 to invoke emotions of the members of the assessors when this was not lead in evidence by the Prosecution during the trial. He did not properly direct the assessors on the issue.*

6. ***THAT*** *the Learned Trial Judge erred in facts and law when he could not distinguish and consider that the Appellant was not involved in any planning of the formulation of the document (Prosecution Exhibit 28.)*

7. ***THAT*** *the Learned trial Judge erred in law and fact when he failed to take into account the lead Investigator's findings that there was no evidence of the existence of any rival government in place since November 2014.*

8. ***THAT*** *the Learned Trial Judge erred in law and fact when he failed to assert the authority of the oath taken by the Appellant despite being made aware of the OATHS taken by Government Ministers as set out in the Fiji Constitution 2013. There was no copy of the supposed oath said by the Appellant (6th accused in the High Court) handed into Court by the Prosecution as exhibit for the information of the Court and Defence Counsel.*

9. ***THAT*** *the Learned Trial Judge erred in law and fact when he did not give proper direction to the assessors on the OATH issue.*

10. ***THAT*** *the Learned trial Judge erred in law and fact when he failed to consider that in the absence of a rival government, the supposed oath and the alleged signing of the acceptance of Ministerial positions is void and meaningless.*

SENTENCE

11. ***THAT*** *the Honourable Trial Judge erred in law and passed a sentence that is "harsh and excessive". He is a first offender and there was no consideration for a "suspended sentence".*

12. ***THAT*** *the Honourable Trial Judge erred in law and facts when he took irrelevant matters into consideration when passing sentence on the Appellant.*

01st to 03rd, 06th and 10th grounds of appeal

[10] The appellant's main challenge is to the finding of seditious intention against him in the above five appeal grounds.

[11] The trial judge had identified the elements of the charges levelled against the appellant in paragraphs 15, 18-24, 28 and 29 of the summing-up. The judge had then directed the assessors as to what the prosecution had to prove in terms of establishing seditious intention in paragraphs 32, 33, 36 and 37. The trial judge had brought to the attention of the assessors the evidence led by the prosecution against the appellant in paragraphs 42-46, 50, 52, 53, 66-68 and 117-126 in support of its case and the appellant's evidence in paragraphs 167-184 of the summing-up. The judge had then analyzed once again what the prosecution had undertaken to prove and the appellant's position in paragraphs 188-190, 202 and 203 of the summing-up. The judge had specifically directed the assessors in paragraph 223 of the summing-up that they need to look at the contents of the entirety of PE28 before coming to a conclusion whether the words used in the document are seditious or not in terms of section 67 of the Crimes Act. The trial judge had quoted the following paragraphs in particular from PE28 for consideration of the assessors at paragraph 226 of the summing-up.

226. The document headed "Nadroga-Navosa Sovereign Christian ***State*** *Provisional Institutions of Self-Government" (prosecution exhibit no. 28)* ***states*** *inter-alia:-*

Page 1, first paragraph

"We, the democratically elected (by consensus) leaders of the People, hereby declare Nadroga-Navosa Province to be an independent and sovereign ***State*** *, and to be hereinafter known as the "Nadroga-Navosa Sovereign Christian* ***State*** *".*

Page 2, Line 15

"Therefore, we intend to put immediate end to all self-serving governments of all persuasions who have ruled us contemptuously in the past, as from the date of this Declaration."

Page 2, second paragraph, line 5

"We also claim the rights accorded us by the Statutes of Genocide 1949 for protection against genocidal laws which have been promulgated by the current government of Fiji over the past eight years, and which are now enshrined in their Fiji 2013 'mainstreaming' Constitution..."

Page 3, second paragraph

"As native people of Fiji, we reject outright the 'mainstreaming' Constitution of the current government, assented to on 6 September, 2013..."

Page 3, second paragraph, line 6

"We also reject outright the use of the thesis written by Muslim man, Aiyaz Saiyed Khaiyum, who is Fiji's current Attorney-General and Justice Minister,... for the 'extermination' of the native Fijian race of people from the landscape of Fiji, our country of origin..."

Page 3, third paragraph

"Our overwhelming desire to free and extricate ourselves and our future generations from the tyranny of foreign subjugation and genocidal laws intended for our extermination ... is the single decisive impetus for our Unilateral Declaration of Independence on 10 October, 2014."

Page 7, paragraph 6

"As attested to by facts articulated in this Declaration, we, the democratically elected (by consensus) leaders of the People of Nadroga-Navosa for reasons pertaining to our own survival, and that of our generations to come, hereby declare this province of Nadroga-Navosa to be an independent and sovereign ***State*** *,and to hereinafter known as the "Nadroga-Navosa Sovereign Christian* ***State*** *"..."*

[12] Having done so, the trial judge had directed the assessors at paragraph 227 of the summing-up to the appellant's position that no seditious intention was entertained and elaborated once again the explanations of the appellant at paragraph 238. He had also directed the assessors in paragraph 249 and 268 to consider the cautioned interview and PE28 *in toto* to decide whether the contents of PE28 were seditious or not. He had also directed the assessors in paragraphs 265 and 266 that if the appellant is believed, his signing PE28 and taking an oath as a Cabinet Minister were not intentional and they should find him not guilty. Even if he is disbelieved, the assessors were asked to still decide whether those acts were done with seditions intention (see paragraph 267). The judge had also brought to their attention the deeming provision of section 66(2) of the Crimes Act, 2009 in relation to deciding the seditious intention on the part of the appellant (see paragraphs 22 and 272). Finally, the trial judge had given directions to the assessors to find the appellant not guilty if they believed his version and then directed them that even if they did not believe him still they had to consider whether prosecution had proved its case beyond reasonable doubt (see paragraphs 278, 279 and 283 of the summing-up).

[13] After the assessors had by a majority found the appellant guilty of count 11 and not guilty of count 12, the trial judge had in his judgment directed himself according to the summing-up and gone further and analyzed the evidence against (paragraphs 7-32) and for the appellant (paragraphs 101-109) in agreeing with them and in paragraphs 110-122 in disagreeing with the majority of assessors and overturning the not guilty opinion.

[14] 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).

Kaivum 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)]

[15] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Balcilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

[16] The judge has fully complied with the law in agreeing and disagreeing with the majority of assessors.

[17] The judge had considered the appellant's evidence carefully and concluded in the judgment in respect of count 11 as follows.

> *107. I am satisfied that the accused told the truth in his record of interview which is also confirmed in cross examination. The accused in his record of interview did not say that he did not know about the contents of prosecution exhibit no. 28 when facts were fresh in his mind. I do not believe the accused that he did not know about the contents of the document at the time of signing. The document (prosecution exhibit no. 28) contains language which is intemperate, inciteful, provocative, relentless and inflammatory which has the tendency to raise discontent or disaffection amongst the inhabitants of Fiji. The accused is deemed to have intended the consequences of his action.*
>
> *108. I am satisfied beyond reasonable doubt that the 6th accused signed the document headed "Nadroga-Navosa Sovereign Christian State Provisional Institutions of Self-Government with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.*
>
> *109. I accept the majority opinion of the assessors and I find the 6th accused guilty of the 11th count as charged.*

[18] The trial judge analyzed the not guilty opinion in count 12 in the judgment as follows.

> *111. In his record of interview the accused informed the Police of the following:*
>
> *"Q.36 It is alleged that there was a swearing in ceremony at Cuvu for the appointed persons to be the cabinet Member of the new Vanua Government of Nadroga/Navosa. Do you have any idea this?*
>
> *Ans: Yes I am one of those appointed.*
>
> *Q. 39What were you appointed for in this new Vanua government?*
>
> *Ans: I was appointed as Minister for Fisheries.*
>
> *Q. 40 Who appointed you.*
>
> *Ans: I was voted for and supported by the raising of hands.*
>
> *Q. 41 Did you accept this appointment or it was forced upon you?*
>
> *Ans: I gladly accept it.*
>
> *Q. 46 Do you have any similar document as this?*
>
> *Ans: I believe so since I am Minister.*
>
> *Q. 51 In signing your name in the said document, does it mean also that you recited your oath statement in supporting the movement which Ratu Osea and Mereoni are officiating?*
>
> *Ans: Yes. I made an oath.*
>
> *Q.52 What did you say in your oath statement?*
>
> *Ans: I have forgotten.*
>
> *Q.53 What were you doing whilst reciting your oath statement?*
>
> *Ans: I was following what was said by Mereoni."*
>
> *112. In his evidence the accused stated that he did not have any intention to bring into hatred or excite disaffection against the present Government.*
>
> *113. In cross examination when the accused was referred to the answer 39 in his record of interview where it was stated "I was appointed as Minister for Fisheries" the accused disagreed saying that he had told the Police Officer*

that he was only the representative for the Matanitu Vanua of Nadroga-Navosa.

114. The accused agreed that during his interview he was given the opportunity to change his answers but he did not.

115. The accused further stated that the people of Nadroga-Navosa only wanted the Province to be a Christian State and for the non-Christians living in the Province they will be persuaded to become Christians. The accused agreed he was particularly upset about the Surfing Decree as per his answer to Q.55 in his record of interview.

116. The accused in his evidence stated that he did not have any intention to bring into hatred or excite disaffection against the present government in respect of the 12th count.

[19] Thereafter, the judge had given the following reasons why he was not agreeing with the majority of assessors on count 12.

117. I do not accept that the 6th accused told the truth in court when he stated that he did not have any seditious intention when he took an oath to serve as a Minister for Fisheries for an unlawful entity.

118. The appointment of Cabinet Ministers and then taking an oath in whichever form is indicative of the formation of another Government which has the tendency to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

119. The form or contents of the oath taken is irrelevant to the charge. The purpose of the oath is relevant which was to serve as a Cabinet Minister for an unlawful entity.

120. I am satisfied that the accused told the truth to the Police during his interview that he took an oath to serve as Minister of Fisheries for the entity "Nadroga-Navosa Sovereign Christian State". The accused is deemed to have intended the consequences of his actions.

121. I am satisfied beyond reasonable doubt that the 6th accused took an oath to serve as the "Minister of Fisheries" for the entity Nadroga-Navosa Sovereign Christian State with the seditious intention to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

122. I therefore overturn the majority not guilty opinion of the assessors and accept the minority opinion by finding the 6th accused guilty of the 12th count as charged.

[20] The appellant's argument that there was no evidence of discontent or dissatisfaction among the inhabitants of Fiji would hold little water as the eleventh charge levelled against him did not require such evidence to make the appellant culpable. In my view, tangible evidence of actual discontent or dissatisfaction among the inhabitants of Fiji is not required to prove a charge under section 67(1)(a) of the Crimes Act, 2009. What is required is the inference of the intention to raise discontent or dissatisfaction among the inhabitants of Fiji.

[21] Nor do I think that there was a requirement on the part of the trial judge to explain to the assessors the difference between Matanitu Vanua of Nadroga-Navosa and Nadroga-Navosa Sovereign Christian State.

[22] It is a totally ill-founded allegation against the trial judge to state that he had quoted racially derogatory sections of PE28 to invoke the emotions of the assessors. They appear to be the parts that have a direct relevance to infer the seditions intention or otherwise of the appellant and therefore, there was nothing wrong for the judge to have drawn them to the attention of assessors and himself.

[23] The appellant had not pointed out any other paragraphs in PE28 which could demonstrate an innocent intention but not cited by the trial judge. Further, the trial judge had specifically directed the assessors to consider the entirety of the document in conjunction with the appellant's cautioned interview in order to draw whether seditious intention could be drawn.

[24] Therefore, in all the circumstances above discussed, I do not find any reasonable prospect for the above grounds of appeal to succeed before the full court.

4th and 5th grounds of appeal

[25] The argument here is that the appellant was not involved in any planning and the formulation of the document PE28 and he could not write and read English.

[26] It is clear that the prosecution had not conducted its case on the basis that the appellant was the author of PE28 or he had compiled PE28 or he was involved in formulating PE28. To incur criminal liability under section 67(1)(a) of the Crimes

Act, 2009, the prosecution did not have to attribute the authorship of PE28 to the appellant. The trial judge had fully understood it and never attempted to attribute such an authorship of PE28 to the appellant either in the summing-up or the judgment. It had been brought to the meeting on 04 November 2014 by Ms. Mereoni Kirwin.

[27] Therefore, these grounds of appeal have no reasonable prospect of success in appeal.

07th ground of appeal

[28] Contrary to the assertion of the appellant, the trial judge had in fact directed the assessors at paragraph 118 of the summing-up on the evidence of the investigator (PW6) that there was no evidence of a rival government functioning in the province of Nadroga-Navosa.

[29] Therefore, this ground of appeal has no reasonable prospect of success.

08th and 09th grounds of appeal

[30] The gist of the argument here is based on the oath taken by the appellant. The appellant complains of the oath supposedly taken by him, its contents and it being different to the oath administered on the Cabinet Ministers of the Fiji Government. These matters relate to the twelfth count.

[31] The trial judge had dealt with what the prosecution was expected to prove under count twelfth at paragraph 37 of the summing-up. The eye-witness Mr. Napolioni Batimala had testified to the appellant having taken an oath but he could not remember the contents of the oath. The judge had referred to the appellant's version of the oath taking in paragraphs 202 and 203 of the summing-up. Then the trial judge had addressed the assessors on the oath taking event at paragraphs 265, 267 and 271of the summing-up.

[32] In the judgment the trial judge had given his mind to the evidence on the appellant having taken an oath as a Cabinet Minister in paragraphs 17 – 19, 30, 31, 118 – 122 of the judgment. His conclusion is as follows.

121. I am satisfied beyond reasonable doubt that the 6th accused took an oath to serve as the "Minister of Fisheries" for the entity Nadroga-Navosa Sovereign Christian State with the seditious intention to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

122. I therefore overturn the majority not guilty opinion of the assessors and accept the minority opinion by finding the 6th accused guilty of the 12th count as charged

[33] The appellant has not demonstrated why the trial judge's finding on his oath taking as a Cabinet Minster was erroneous.

[34] Therefore, these grounds of appeal have no reasonable prospect of success in appeal.

11th ground of appeal

[35] The appellant complains that the trial judge had failed to consider that in the absence of a rival government the supposed oath and the alleged signing of the acceptance of the Ministerial position were void and meaningless.

[36] The trial judge was well aware of the fact that there was no evidence of a rival government in existence (see paragraph 118 of the summing-up). However, it was not crucial for the charges under section 67(1)(a) of the Crimes Act, 2009 to be proved.

[37] Since the trial judge had directed himself in accordance with the summing-up in the judgment he should be deemed to have considered the above evidence in the judgment as well.

[38] The judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could

reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[39] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

[40] In any event the appellant's counsel should have sought redirections in respect of all the complaints now being made on the summing-up 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). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

Grounds of appeal on sentence

01st ground of appeal

[41] The appellant complains that the trial judge had not considered the fact that he was a first time offender and his advanced age. However, I find that in paragraph 63 and 70 of the sentencing order the judge had referred to the fact that the appellant was aged 74 and a person of good character without any previous conviction.

[42] The appellant complains that the sentence passed on her was harsh and excessive and wrong in principle in all circumstances of the case.

[43] The maximum sentence for an offence under section 67(1) is 07 years of imprisonment. The trial judge had picked the starting point at 03 years, given a discount of 06 months for all mitigating features (there being no aggravating factors as conceded by the state) and reduced 02 months and 19 days of remand period to arrive at the final sentence of 02 years, 03 months and 11 days.

[44] The trial judge had carefully considered the objective seriousness of the offence, the purpose of the sentence, some previous sentencing decisions, why the sentence should not be suspended and explained why he was not imposing a non-parole period (*vide* paragraphs 8 – 16, 66, 67, 68-72 and 73 of the sentencing order)

[45] The trial judge had not erred in principle. Neither was the sentence harsh and excessive.

02nd ground of appeal

[46] As alleged by the appellant the trial judge had not taken any irrelevant maters into account contrary to the appellant's criticism.

03rd ground of appeal

[47] The appellant has submitted that the starting point of 03 years is too high but has not substantiated that assertion with any law or judicial precedents.

[48] Therefore, there is no sentencing error in the sentence order of the learned High Court judge.

[49] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[50] Before parting with this ruling I wish to point out that the drafting of appeal grounds has left a great deal to be desired. As stated in **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006) the counsel seems to have adopted a 'scatter gun' approach in drafting some appeal grounds. In **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020). I made *inter alia* the following remarks on drafting of appeal grounds.

*'[20] Lord Parker CJ in **Practice Note (Crime: Applications for Leave to Appeal)** [1970] 1 WLR 663 reminded counsel that 'it is useless to appeal without grounds and that the grounds should be substantiated and particularized and not a mere formula'. Though what degree of particularity is required may not be capable of precise definition, they should be detailed enough to enable court to identify clearly the matters relied upon.*

*[21] It is the duty of the counsel in drafting and arguing grounds of appeal to act responsibly and not to make sweeping and unjustified attacks on the summing-up of the trial judge unless such attacks can be justified [vide **Morson** (1976) Cr App R 236]. Thus, counsel should not settle or sign grounds of appeal unless they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court [vide paragraph 2.4 of the '**A Guide to Proceedings in the Court of Appeal Criminal Division** ('the Guide') published in 77 Cr App R 138].*

*[22] Du Parcq J in **Fielding** (1938) 26 Cr App R 211 said that*

> *'It is most unsatisfactory that grounds of appeal should be drawn with such vagueness ..... Ground 4 is in the following terms: "That the judge failed adequately to direct the jury as to the law and evidence to be considered by them".'*
>
> *'It is not only placing an unnecessary burden on the court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet.'*

*[23] In **Singh** [1973] Crim LR 36 the Court of Appeal drew attention to the danger of extracting sentences from the summing-up out of context when, if they had been quoted in context, they would have been unobjectionable. **Nico** [1972] Crim LR 420 similarly states that the terms of any misdirection relied upon must be set out in the grounds.*

*[24] While the grounds of appeal should be reasonable full, counsel should not go to the opposite extreme and overloading them [vide **Pybus** (1983) The Times, 23 February 1983]. In **James; Selby** [2016] EWCA Crim 1639; [2017] Crim.L.R.228 the court warned that if grounds of appeal are inexcusably prolix and not consolidated , an application for leave to appeal might be refused on the basis that no ground was identifiable.*

Order

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL