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

CRIMINAL APPEAL NO.AAU 123 of 2019
[In the High Court at Suva Case No. HAC 168 of 2016]

BETWEEN	:	**TUALAUTA UTUELI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**05th and 15th October 2021**
Date of Ruling	:	**19 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with seven counts of rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 and two counts of sexual assault contrary to section 210 (1) (a) and (2) of the Crimes Act, 2009 committed at Cunningham in the Central Division from 2013 to 2016.

[2] The information read as follows:

COUNT 1

Statement of Offence

RAPE: *Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.*

Particulars of Offence

TUALAUTA UTUELI *on the 16th day of March, 2013, at Cunningham, in the Central Division, penetrated the vagina of AB, a child under the age of 13 years with his finger.*

COUNT 2

Statement of Offence

RAPE: *Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.*

Particulars of Offence

TUALAUTA UTUELI *on the 23rd day of March, 2013, at Cunningham, in the Central Division, penetrated the vagina of AB, a child under the age of 13 years with his finger.*

COUNT 3

Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) and (2) of the Crimes Act of 2009.*

Particulars of Offence

TUALAUTA UTUELI *on the 23rd day of March, 2013, at Cunningham, in the Central Division, unlawfully and indecently assaulted AB, a girl under the age of 13 years old by licking her vagina.*

COUNT 4

Statement of Offence

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

Particulars of Offence

TUALAUTA UTUELI *on the 13th day of April, 2013, at Cunningham, in the Central Division, had carnal knowledge of AB, without her consent.*

COUNT 5

Statement of Offence

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

Particulars of Offence

TUALAUTA UTUELI *on the 13th day of April, 2013, at Cunningham, in the Central Division, unlawfully and indecently assaulted AB, by sucking her breast.*

COUNT 6

Statement of Offence

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

Particulars of Offence

TUALAUTA UTUELI *on the 20th day of April, 2013, and the 21st day of December 2013, at Cunningham, in the Central Division, had carnal knowledge of AB, without her consent.*

COUNT 7

Statement of Offence

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

Particulars of Offence

TUALAUTA UTUELI *on the 04th day of January, 2014, and the 31st day of December 2014, at Cunningham, in the Central Division, had carnal knowledge of AB, without her consent.*

COUNT 8

Statement of Offence

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

Particulars of Offence

TUALAUTA UTUELI *on the 01st day of January, 2015, and the 31st day of December 2015, at Cunningham, in the Central Division, had carnal knowledge of AB, without her consent.*

COUNT 9

Statement of Offence

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

Particulars of Offence

> ***TUALAUTA UTUELI*** *on the 01st day of January, 2016, and the 09th day of March 2016, at Cunningham, in the Central Division, had carnal knowledge of AB, without her consent.*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 15 August 2019 to an imprisonment of 17 years with a non-parole period of 15 years (after the remand period was deducted the sentence is 16 years, 03 months and 20 days with a non-parole period of 14 years, 03 months and 20 days).

[4] The appellant had appealed in person against conviction and sentence in a timely manner (27 August 2019). Thereafter, he had filed 07 additional grounds of appeal and written submissions and an abandonment notice in Form 3 in respect of the sentence appeal (31 July 2020). Four (A – D) additional grounds (09 September 2020) and submissions (15 September 2020) had been tendered subsequently. The appellant's bail pending appeal application, submissions and additional submissions had reached the CA registry on 27 October 2020, 10 November 2020, 25 January 2021 & 20 April 2021. The respondent had filed written submissions on the leave to appeal application and bail pending appeal application (12 January 2021) and supplementary submissions on 03 March 2021. The appellant had tendered another set of supplementary submissions covering 07 grounds and 04 (A – D) additional grounds on 14 April 2021. The respondent's written submissions (12 January 2021, 03 March 2021 and 04 October 2021 have also covered all 11 grounds of appeal and the bail pending appeal application.

[5] The matter was taken up for leave to appeal hearing on 05 October 2021 and since the hearing could not be completed due to the loss of Skype connection where the appellant participated at the hearing from his correction centre, this court re-fixed the hearing for 15 October 2021. Consequent to a request made by the appellant for a Samoan interpreter, the CA Registry had arranged Mr. Louis Jalesa Ofele Lene of the Samoan High Commission, Suva to be present at the hearing on 15 October 2021.

Accordingly, the leave to appeal hearing proceeded on 15 October 2021 with the participation of Mr. Louis Jalesa Ofele Leneas as the interpreter. The appellant made uninterrupted oral submissions for about 15-20 minutes in English and for the second time also in English for about 10 minutes in reply to the state *via* Skype. The state counsel made oral submissions in open court. The court reserved the ruling on leave to appeal for 19 October 2021.

[6] 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 test in a timely appeal for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> ***Ground 1***
>
> *THAT the charges upon which the Trial Judge convicted the appellant despite the appellants plea of not guilty was based on false information given to Police in bad faith, and the Trial Judge failed to independently investigate this as required by law therefore erred in law.*
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> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to record the inconsistencies and contradictions in PW1 and PW2's evidence and therefore a substantial miscarriage of justice has occurred.*

Ground 3

THAT the Learned Trial judge erred in law and in fact in accepting and relying on the medical examination form page 1 – A(4) states that the victim was 8months pregnant but on page 4 – D(15) and D (16) stated the victim is 20 weeks pregnant, which is 5 months, in addition the medical report contain 2 different years, the medical examination was conducted on 21st of March, 2016 but the PEP was on the 24th of March 2016, and the statement of the doctor was on the 21st of March, 2013 written and signed by him, which resulted in a fabricated evidence and unsafe conviction.

Ground 4

THAT the Learned Trial Judge erred in law and in fact in accepting the victim's evidence when testifying at page 14, paragraph 20 (XV). In the summing up that the appellant had tried to get rid of the pregnancy many times, when the victims does not specifically name any herbal medicine or to consider the weight of the appellant when punching and jumping on the victim's tummy, if the victim had gone through what she stated at summing up paragraph 20 (XV), then she can likely go through some side effect because she stated it happened for about 3-4times.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he accepted in his judgment false facts, therefore the appellant by adducing fresh evidence to assist on the facilitation of true facts, will confirm that a substantial miscarriage of justice has occurred.

Ground 6

THAT the Learned Trial Judge has ignored the complainant (Fauzia Nazneen) directive with her mother to the DPP office for the case to be withdrawn and in that the Judge was wrong in law.

Ground 7

THAT the appellant was not sufficiently represented by his legal counsel during the course of the Trial whereby his counsel deliberately and consistently ignored the appellant and acted with prejudice and bias against the appellant. This eventually led to grave miscarriage of justice to the appellant and therefore the oversight by the Trial Judge as the Judge of facts in failing to recognize and investigate this bias erred in law.

Additional grounds

Ground 1(A)

THAT the Learned Trial Judge erred in law and fact in not adequately directing/misdirecting that the prosecution evidence before the Court proved beyond reasonable doubt that there were serious bouts in the prosecution case and as such the benefit of bout to have been given to the appellant.

Ground 2 (B)

THAT the Learned Trial Judge erred in law and fact in not adequately directing the assessors the significance of prosecution witness conflicting evidence during the trial.

Ground 3(C)

THAT the Learned Trial Judge erred in law and fact in not directing himself and or the assessors to refer any summing up the possible defence on evidence and as such by his failure there was substantial miscarriage of justice.

Ground 4 (D)

THAT the Learned Trial Judge erred in law and fact in not adequately/sufficiently/directing putting the defence case to the assessors.

[8] The prosecution case had been built on the direct evidence of the complainant who was admittedly born on 02 April 2000 (therefore when the 01st and 02nd rape incidents and the third sexual assault incident allegedly took place she was still under 13 years of age), her mother and the doctor. The complainant was the appellant's step-daughter. The appellant had remained silent at the trial and did not call any witnesses. However, his position as taken up in cross-examination had been that he engaged in sexual activities with the complainant's consent when she was above the age of 13 years. He had admitted having had sexual intercourse with the complainant in 2014, 2015 and 2016. It appears that he had denied alleged incidents in 2013.

01st ground of appeal

[9] The appellant submits that the charges against him were based on false information given to the police in bad faith and the trial judge had failed to investigate it.

[10] The trial judge had traversed the entirety of the evidence led by the prosecution at paragraphs 20-22 (complainant), at paragraph 23 (her mother) and at paragraph 24 (doctor). The trial judge had also dealt with the appellant's silence and his stance taken under cross-examination of the complainant at paragraphs 26 and 29 of the summing-up. However, the appellant's position that the complainant had given false information with bad faith had not been part of his defence case as put forward by his trial counsel. It appears that nothing on those lines had even been suggested to the complainant or her mother.

[11] After lower court proceeding, lawyers and/or appellants may be tempted to devise new arguments on appeal in the hope of having an unfavourable decision overturned. However, the legal threshold for advancing novel positions on appeal remains high.

[12] A party seeking to raise new issues on appeal has a high onus. In order for the new issues to be considered, the appellant must show the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial. In other words, if a complete record is not before an appeal court, the court is in no position to assess its merits. Where, of course, the new issue raised is one of pure law, this burden necessarily eases, as the existence of a complete factual record is not as necessary (vide **R. v. Brown** [1993] 2 S.C.R. 918). Per L'Heureux-Dubé J. (dissenting):

> *Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue, ……, for the first time on appeal: first, there must be a sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and third, the court must be satisfied that no miscarriage of justice will result. In this case there has been no change in the substantive offence, the issue was not raised at trial, with the result that the record necessary for appellate review of the issue is unavailable, and there has been no denial of justice to the accused. The Court of Appeal therefore properly concluded that no appeal on this new issue should be entertained.*

[13] The reluctance to admit new issues is based largely on a concern for fairness to the parties. As a 2008 decision of the Ontario Court of Appeal, 767269 **Ontario Ltd. v. Ontario Energy Savings L.P.** 2008 ONCA 350 makes clear,*" ... it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised."* That being said, the decision to consider a new question is entirely within the appellate court's discretion. Although the threshold is onerous, there is no doubt that if it is in the interests of justice that the new issue be considered, it will be. This is particularly so where a party may not have had effective counsel at first instance or where there is a good explanation for the omission in the lower court. The appellant's fresh complaint does not pass this high threshold.

[14] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[15] The appellant alleges that the trial judge had failed to highlight inconsistencies and contradictions in the evidence of PW1 (complainant) and PW2 (mother).

[16] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal sets down the judicial approach to inconsistencies as follows: [see **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) as well]:

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any **inconsistency** or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

[17] The trial judge had directed the assessors at paragraphs 09-11 of the summing-up as to how they should approach inconsistent evidence, if any. However, the trial judge

found no material inconsistencies between the testimonies of PW1 and PW2 that affect the credibility of PW1 (see paragraph 16 of the judgment).

[18] Therefore, there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[19] This ground of appeal is based on some entries on the medical examination form on the age of the pregnancy (20 weeks *versus* 05 months) and date of examination. Her pregnancy was eventually medically terminated.

[20] The summing-up and the judgment suggests that the counsel for the appellant had not challenged the authenticity of the medical report or its contents. There does not appear to have been a challenge to the evidence of PW3 (doctor) who had stated that he examined the complainant on 21 March 2016 and he found her to be 20 weeks pregnant. The doctor had not been cross-examined at all (see paragraph 24 of the summing-up).

[21] While the details of the first page of the medical examination form are by and large filled by the police officers accompanying the victim or what matters at the trial is the evidence given by the doctor under oath which in this case stands unchallenged. The findings recorded by PW3 in the medical report had been consistent with his evidence under oath. Thus, there is no basis for the trial judge to doubt the medical evidence or the evidence of PW1 and PW2 based on PW3's evidence (see paragraph 17 of the judgment). Even if the age of the pregnancy given by the complainant is different to what the doctor found out through his examination it would not materially affect the complainant's credibility as she being a girl of just over 13 years allegedly subjected to sexual abuse over several years could not have been precise as to the age of her pregnancy.

[22] Therefore, there is no reasonable prospect of success in this ground of appeal.

04th ground of appeal

[23] Basing his argument on what the trial judge had stated at paragraph 20 (xv) of the summing-up, the appellant submits that the victim had not specifically mentioned the name of any herbal medicine and his body weight if he had jumped on her stomach 3-4 times. These are methods allegedly used by the appellant to get rid of the victim's pregnancy.

[24] Why these things, if even known to the victim, should matter in the matter of conviction is difficult to comprehend. The appellant is alleged to have sexually abused his step daughter for 04 years and made many an unsuccessful attempt to end her pregnancy when it became known. The lack of exact details of the herbal medicine given to her by the appellant or his body weight would do little harm to her credibility.

[25] Therefore, there is no merit at all in this ground of appeal.

05th ground of appeal

[26] The appellant complains that the trial judge had accepted 'false facts' in his judgment and he intends to adduce fresh evidence to assist facilitation of 'true facts'.

[27] Adducing fresh evidence in appeal is altogether a different matter from the merits of the current appeal at this stage. If made, the full court would consider any such application applying the relevant principles of law at the appropriate time. As far as the criticism that the trial judge had accepted 'false facts' is concerned there is no merit at all in the complaint. The trial judge had only considered the testimonies under oath tested by cross-examination. The assessors and the trial judge had accepted them as true and credible.

[28] Therefore, there is no merit in this ground of appeal.

06th ground of appeal

[29] The appellant submits that the trial judge had not taken the complainant's attempt to withdraw the case by attending the DPP's Office into consideration.

[30] I find among the papers submitted to this court by the appellant the complainant's police statement on the same matter on 03 July 2018 where she had referred to attending the DPP's Office seeking to withdraw the case. Her police complaint is a living proof of the horrendous experience she had undergone as a result of the sexual abuse of the appellant and how eager she was to forget the ordeal and end her inner suffering caused by the appellant to her life which is the reason for her attempt to withdraw the complaint. There is not the slightest hint of her complaint made in 2016 being anything but true. Her evidence at the trial has demonstrated it vividly and she had not wavered from her allegations against the appellant even slightly during her testimony in court despite her attempt to withdraw the complaint by attending DPP's Office.

[31] There was no need for the trial judge to have considered anything other than the evidence led at the trial and in any event the real reasons for the complainants' attempt to withdraw her complaint are self-explanatory.

[32] Therefore, there is no merit at all in this ground of appeal.

07th ground of appeal

[33] The appellant criticises the trial counsel for being incompetent. The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground cannot be even entertained and should be dismissed.

[34] In **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021) I had the occasion to state as follows on a similar ground of appeal based on incompetent advocacy:

> *'[25] In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty [**Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008)]*
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> *[26] Yet, O' Connor LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of 'flagrantly incompetent advocacy'.*
>
> *[27] In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam** [1988] Crim. LR 109 CA (Crim Div)*
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> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*
>
> *[28] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:*
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> > *''[21]…….. It is not for a court to inquire into the advice tendered by counsel to his client…….. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……'*
>
> *[29] NSW Court of Criminal Appeal in **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9 is an authority (Gleeson CJ, McInerney J and Lusher AJ 4, 11 May, 7 June 1990) to the following propositions.*
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> *'As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment,*

including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of the barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case.'

'As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

'However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.'

[30] Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in ***Chong Ching Yuen v Hksar*** *(2004) 7 HKCFAR 126; [2004] 2 HKLRD 681 said:*

'48. It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been made by the defendant personally. Nor will other forms of mere error of judgment.

49. Nevertheless, the courts have recognised that in some exceptional instances*, an error of sufficient proportion and consequence will enable the court to intervene and avert a miscarriage of justice. To describe this ground, the expression "flagrant incompetence" has generally been used ....' (emphasis added).'*

[35] I do not see any evidence of 'flagrant incompetence' on the part of the appellant's trial counsel in this instance who had robustly cross-examined the complainant and her mother.

[36] Therefore, there is no merit in this ground of appeal.

Additional grounds

Ground 1(A)

[37] The appellant argues that the trial judge had failed to adequately direct or misdirected the assessors that the prosecution had proved its case beyond reasonable doubt because there were serious doubts in the prosecution case and the benefit of the doubts should have been given to the appellant.

[38] The problem with this ground of appeal is that the appellant had failed to specify what the alleged 'serious doubts' were in the prosecution case. He had not substantiated or elaborated instances of such 'serious doubts'. I dealt with a similar scenario at length in **Pal v State** [2020] FJCA 179; AAU145 of 2019 (24 September 2020) and do not want to repeat my observations and findings made in ***Pal*** here as well except to say that the 'scatter gun' approach to drafting of appeal grounds by lawyers or appellants would do little to advance their cause.

[39] The trial judge had sufficiently directed the assessors at paragraphs 3, 14, 15, 19, 28 and 29 on the burden and standard of proof and the requirement of being satisfied beyond reasonable doubt on all elements of the offences before an opinion of guilty was brought.

[40] The trial judge in his judgment too had analysed all the evidence and satisfied himself that the case against the prosecution had been proved beyond reasonable doubt. The prosecution is not expected to prove a case beyond any doubts including fanciful doubts or to a mathematical accuracy.

[41] I do not find any 'serious doubts' as alleged by the appellant in the prosecution case as presented in the summing-up or in the judgment. On the contrary, I find that it was quite open for the assessors and the trial judge to have found the appellant guilty of the charges beyond reasonable doubt [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v**

R (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) for the test for verdicts allegedly ***'unreasonable or cannot be supported having regard to the evidence'***].

[42] Therefore, there is no merit at all in this ground of appeal.

Ground 2(B)

[43] The appellant submits that the trial judge had failed to address the assessors on the significance of conflicting evidence led during the trial.

[44] The appellant had not specified what those alleged items of conflicting evidence were. This ground is similar to the second ground of appeal on inconsistent evidence earlier dealt with.

[45] The trial judge had directed the assessors at paragraphs 09-11 of the summing-up as to how they should approach inconsistent evidence. However, the trial judge found no material conflict between the testimonies of PW1 and PW2 that affect the credibility of PW1 (see paragraph 16 of the judgment).

[46] Therefore, there is no reasonable prospect of success in this ground of appeal.

Ground 3(C)

[47] The appellant alleges that the trial judge had not directed himself and the assessors on possible defences.

[48] The only defence taken up by the appellant had been that he engaged in sexual acts with the complainant after she had attained 13 years of age with her consent. He had by implication denied previous charges.

[49] The trial judge had in deed directed the assessors on defilement at paragraph 19 and 29(i) of the summing-up (and paragraph 18 of the judgment) as the only possible

alternative defence or verdict. However, obviously both the assessors and the trial judge had rejected the defence of consent for sexual acts in 2014, 2015 and 2016 and the appellant's denial for the acts committed in 2013.

[50] Therefore, there is no reasonable prospect of success in this ground of appeal.

Ground 4 (D)

[51] The appellant complains that the trial judge had not adequately put the defence case to the assessors.

[52] The appellant did not give evidence. The defence case was put during cross-examination by the appellant's counsel which was consensual sex after the complainant became 13 years of age. The appellant had admitted having engaged in sexual intercourse in 2014, 2015 and 2016 with the complainant. It is a denial of the acts that allegedly occurred in 2013.

[53] This simple position had been sufficiently placed before the assessors by the trial judge and asked them to consider defilement as well.

[54] Therefore, there is no reasonable prospect of success in this ground of appeal.

[55] In any event the counsel for the appellant could have asked for redirections on the alleged misdirections or non-directions and the failure to do so would disentitle the appellant from even raising them as appeal points (**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) in the absence of any cogent reasons for the failure.

Bail pending appeal

[56] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely

(a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[57] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[58] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[59] As I have already determined, the appellant's conviction appeal has no reasonable prospect of success leave aside the prospect of 'very high likelihood of success'.

There are no exceptional circumstances either. Though not strictly relevant now, it appears that if renewed by the appellant, the full court will hear the appellant's appeal well before the appellant serves a substantial portion of his sentence.

[60] Therefore, bail pending appeal should be refused.

Orders

1. Leave to appeal against conviction is refused.
2. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL