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

CRIMINAL APPEAL NO. AAU 100 of 2020
[In the High Court at Suva Case No. HAC 107 of 2019S]

BETWEEN	:	**MAKARIO NAQIOLEVU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**19 June 2023**
Date of Ruling	:	**20 June 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Suva on one count rape and one count of assault causing actual bodily harm of his wife. The charges are as follows:

'***Count 1***

Statement of Offence

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

Particulars of Offence

MAKARIO NAQIOLEVU *on the 14th day of March, 2019 at Namosi in the Central Division, penetrated the vagina of MT with a body spray bottle without the consent of the said MT.*

Count 2

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM*: Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

MAKARIO NAQIOLEVU *on the 14th day of March, 2019 at Namosi in the Central Division, assaulted MT thereby causing actual bodily harm to the said MT.'*

[2] The appellant had pleaded guilty to the 02nd count and the assessors had expressed a unanimous opinion that the appellant was guilty of count 01. The learned High Court judge had convicted the appellant on count 02 on his plea of guilty and having agreed with the assessors' opinion, the judge had also convicted him on count 01 and sentenced the appellant on 03 August 2020 to a period of 07 years' imprisonment for rape and 03 years' imprisonment for assault causing actual bodily harm (both sentences to run concurrently) with a non-parole period of 05 years.

[3] The appellant had lodged in person a timely appeal only against conviction. He had also lodged an application for bail pending appeal. His application to lead fresh evidence in appeal could be considered only by the full court and I make no order with regard to that.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test 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) that will 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 (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)].

[5] The trial judge had summarized the facts in the summing-up as follows:

> *15. According to the prosecution, on 14th March 2019, the couple woke up in the morning. The accused wore his ¾ lee pants and it appeared it was not fully dried. According to the prosecution, this started an argument between the couple. They argued and the same became heated. The accused allegedly called his wife a "con woman and a liar." The complainant then allegedly told him to get another woman to look after him, and to let her leave. She then began to pack her belongings to leave the accused.*
>
> *16. According to the prosecution, the accused then approached the complainant and allegedly assaulted her several times. First, he allegedly kicked the left side of her face. Second, he then allegedly stood on her leg and punched her head three times. Third, he allegedly told her to remove her clothes until she was completely naked. Then he allegedly told her to part her legs so that her vagina was fully exposed. Then he allegedly inserted a 3.7 inches body spray bottle into her vagina, without her consent. The complainant allegedly called out for help, but the accused allegedly told her to shut up and punched her in the mouth.*
>
> *17. The accused thereafter allegedly forced her to insert the body spray bottle into her vagina, without her consent. He allegedly knew she was not consenting to the above because she feared him. Later in the day, the prosecution alleged the accused again repeatedly assaulted the complainant by hitting her several times on the body with a hammer. The complainant later reported the matter to police. An investigation was carried out. On 18th March 2019, the accused was brought before the Navua Magistrate Court charged with assaulting and raping the complainant.*

[6] The appellant had remained silent and not called any evidence on his behalf. He was defended by a counsel at the trial.

[7] The grounds of appeal against conviction are as follows:

> ***Ground 1***
>
> *THAT the investigation by police was procedurally flawed, prejudiced and detrimental to the interest of justice for the appellant.*

Ground 2

THAT the direction by the judge to the assessors at (26), lines 6-8 was a misdirection that occasioned a grave miscarriage of justice to the appellant.

Ground 3

THAT the conviction of the appellant for rape was not supported by the totality of the evidence which was deficient and not adequate for the trial court to safely convict.

Ground 4

THAT the Trial Judge had failed to judiciously investigate in a fair manner the charge of rape against the appellant and the circumstances the allegations were made where also the judge had failed to properly warn himself on the issue of lies by the victim, whereby he was wrong in law.

Ground 5

THAT the summary of facts presented in court did not contain evidence of Rape and the assessors unanimous guilt verdict against the appellant was therefore perverse and wrong in law.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors in the summing up the expert evidence of the doctor on his sworn evidence in court and his medical assessment reporting indicating that there was no laceration or abrasions to prove the elements of the charge of rape thus causing a miscarriage of justice and prejudice to the appellant.

Ground 7

THAT if the Learned Trial Judge had independently assessed the evidence in its totality he would have found the appellant not guilty as the medical practitioners in court evidence negates the elements of the charge of rape. This is a substantial miscarriage of justice and prejudice to the appellant.

Ground 8

Does the jurisdiction in Fiji bound to follow the Australian jurisdiction in terms of the Murrays direction in line with the decision in R v Murray (1987) 11 NSW LR IQ establishing the requirements; that in all cases of serious crimes, it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care, before a conclusion is arrived at and a verdict of guilty should be brought in and does the failure of the learned trial judge to accede to such direction in the appellants matter constitute a miscarriage of justice.

Ground 1

[8] The appellant's contention is that the police avoided recording statements of witnesses favourable to him. He has, however, not even mentioned who those witnesses were. The appellant does not seem to have taken up this position during the trial. Nor had he made any attempt to call any of those witnesses at the trial on his behalf. This point is taken-up for the first time in appeal.

[9] Justice L'Heureux-Dubé in the Supreme Court of Canada in **R v. Brown** [1993] 2 SCR 918, 1993 CanLii 114 (SCC) [quoted with approval in **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016)] said on raising new arguments on appeal as follows:

> *'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, including a Charter[1] challenge, 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. (emphasis added)*

[10] Justice L'Heureux-Dubé went on to elaborate this point further as follows:

> *'Courts have long frowned on the practice of raising new arguments on appeal. The concerns are twofold: first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule*

[1] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)

on the new issue: see Brown v. Dean, [1910] A.C. 373 (H.L.), and Perka v. The Queen, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232.

Ground 2

[11] At paragraph 26 of the summing-up the trial judge had not referred to any admitted fact as to the penetration of the complainant's vagina with a body spray bottle. He had only stated what the complainant said in her evidence. The respondent also submits that there was no admission by the appellant as to the alleged penetration and it was a live issue to be proved during the trial by evidence of the complainant. There is no misdirection at paragraph 26 at all. The evidence summarised at paragraphs 16 and 17 of the summing-up contains the complainant's evidence on the act of rape.

Ground 3, 6 and 7

[12] The appellant submits that the allegation of rape was not supported by medical evidence where the doctor had not observed any lacerations or abrasions in the complainant's genitalia.

[13] Firstly, medical evidence is not essential to prove penetration. Secondly, according to the respondent the doctor had seen injuries on other parts of the complainant's body which were consistent with the assault which preceded the act of penetration. Given the fact that the complainant was a mother of four children, it is not surprising that there were no injuries in her vagina by the insertion of a body spray bottle of 3.7 inches long. Lack of corresponding vaginal injuries do not necessarily negate penetration. It does not appear that the doctor in his evidence had excluded such penetration either.

Ground 4

[14] The appellant submits that the complainant had fabricated the allegations due to her extra-marital affair and that is why she had abandoned the children with her relatives and left the matrimonial home.

[15] The respondent submits that the suggestions put to her on the above lines had been rejected by the complainant. Given the fact that she was living with the appellant and their children with his father, younger brother and his wife in his parental home, it is not surprising that she decided to leave that house with the children after the assault (which the appellant admitted) and alleged rape (which he denied). She may not have felt safe in that house any longer. In any event, even if the complainant had an illicit affair with another that would not justify the appellant's actions and exonerate him from the serious act of rape committed in a bizarre manner.

[16] There is no basis to the appellant's contention that the trial judge had failed to judiciously investigate the charge of rape in the above circumstances. It is intriguing as to why the appellant failed to substantiate the said allegations from the witness box apart from the suggestions which were rejected by the complainant. Thus, there was no evidence to support those allegations of matrimonial infidelity by the complainant. The judge had fairly, objectively and in a balanced manner put the appellant's case to the assessors at paragraphs 19-22 of the summing-up.

Ground 5

[17] The summary of facts presented by the prosecution related to the admitted charge of assault causing actual bodily harm and not rape. It is true that the appellant had not admitted rape in the agreed facts but he admitted count 02 of assaulting the complainant causing her bodily harm. Thus, the complainant's evidence under oath on the assault was considered as summary of facts by the trial judge not for rape but for assault causing actual bodily harm which he admitted.

Ground 8

[18] The appellant submits that the trial judge should have addressed the assessors according to ***Murray*** warning [**R v Murray** (1987) 11 NSWLR 12] which may be given by a trial judge pursuant to common law powers, cautions about the danger of convicting on the uncorroborated evidence of a sexual assault complainant—including a child complainant. The warning is generally to the effect that *'where*

there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in'.

[19] However, the Australian Law Reform Commissions have recommended that federal state and territory legislation should prohibit a judge in any sexual assault proceedings from giving a general warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child.[2]As the NSW Taskforce observed:

> *'this would prevent a general warning being given about scrutinising the evidence of the complainant with great care, simply because he or she is alleging sexual assault. However, where there is specific evidence, which suggests that aspects of a complainant's evidence may be unreliable, a comment may still be made about needing to treat such evidence with care.*[3]

[20] In Fiji, section 129 of the Criminal Procedure Act, 2009 states that:

> *'Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration.'*

[21] Corroboration is not the sine-quo-non for a conviction in a rape case (vide **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280). In **Tawatatau v State** [2017] FJCA 50; AAU0060.2013 (26 May 2017) it was held

> *'[31] However, I am of the view that the legislators would not have intended by section 129 to sanction withholding corroborative evidence, if available, from court. In other words section 129 could not have intended to deprive the court of corroborative material, if and when readily available, because both the assessors and the judge would always like to see that the evidence would not only satisfy the elements of the offence but also their conscience that not only the guilty would not go unpunished but also that the innocent would not be convicted. Thus, I believe that all what section*

[2] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/28-other-trial-processes-3/murray-warning/

[3] Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), Responding to Sexual Assault: The Way Forward (2005), 104.

> *129 seeks to achieve is that an accused would not go scot-free merely because the complainant's evidence is not corroborated by other evidence, be it expert evidence such as medical evidence or otherwise. Section 129 is a shield protecting a truthful but uncorroborated testimony of a complainant but should not be used as a sword against an accused.*

[22] Therefore, within the statutory framework of Criminal Procedure Act, 2009 in Fiji, in my view, there is no requirement in law for a trial judge to give the ***Murray*** warning whenever the case against the accused rests on the sole testimony of the victim. In fact the effect of section 129 is to do away with such a warning. In any event, the case against the appellant rested not wholly on the evidence of the complainant but also of the doctor. Thus, ***Murray*** warning does not arise at all.

[23] Therefore, there is no reasonable prospect of success in any of the grounds of appeal. It appears that on the totality of evidence available to them it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and trial judge could have reasonably convicted the appellant on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. Thus, the verdict cannot be said to be unreasonable or one cannot say that the verdict cannot be supported having regard to the evidence.

Law on bail pending appeal

[24] The legal position is that the appellants have 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 appellants 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 appellants have 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, appellants 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)].

[25] 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.

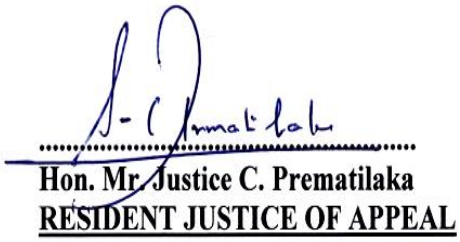
[26] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant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

[27] Since I have already held that there is no reasonable prospect of success in the appellant's appeal against conviction, obviously his conviction appeal does not have a very high likelihood of success. Even the other two considerations namely (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard cannot be answered in his favour at this stage.

[28] Therefore, bail pending appeal application should be refused.

Orders of the Court:

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



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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent