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

CRIMINAL APPEAL NO. AAU 79 of 2022
[In the High Court at Suva Case No. HAC 304 of 2020]

BETWEEN	:	**FAIZAL MOHAMMED** **SHAHANA SHABANA BEGUM**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. P. Gosaiy for the Appellant**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**02 January 2024**
Date of Ruling	:	**03 January 2024**

RULING

[1] The appellants had been charged and convicted in the High Court at Suva on the following charges. There had been two victims.

'***Count 1***
(Representative Count)
Statement of Offence

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

Particulars of Offence

FAIZAL MOHAMMED *between the 1st day of April 2020 and the 1st day of October 2020 at Nakasi in the Central Division, had carnal knowledge of* ***AB****, a child under the age of 13 years.*

Count 2
(Representative Count)
Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) read with Section 45 of the Crimes Act 2009.*

Particulars of Offence

SHAHANA SHABANA BEGUM *between the 1st day of April 2020 and the 1st day of October 2020 at Nakasi in the Central Division, aided and abetted* ***FAIZAL MOHAMMED*** *to have carnal knowledge of* ***AB****, a child under the age of 13 years.*

Count 3
(Representative Count)
Statement of Offence

DEFILEMENT OF YOUNG PERSONS BETWEEN 13 AND 16 YEARS OF AGE: *Contrary to Section 215 of the Crimes Act 2009.*

Particulars of Offence

FAIZAL MOHAMMED *between the 1st day of April 2020 and the 1st day of June 2020, at Nakasi in the Central Division, had unlawful carnal knowledge of* ***BC****, a person being above 13 years and under the age of 16 years.*

Count 4
(Representative Count)
Statement of Offence

DEFILEMENT OF YOUNG PERSONS BETWEEN 13 AND 16 YEARS OF AGE: *Contrary to Section 215 read with Section 45 of the Crimes Act 2009.*

Particulars of Offence

SHAHANA SHABANA BEGUM *between the 1st day of April 2020 and the 1st day of June 2020, at Nakasi in the Central Division, aided and abetted* ***FAIZAL MOHAMMED*** *to have unlawful carnal knowledge of* ***BC****, a person being above 13 years and under the age of 16 years.*

[2] After trial, the trial judge had convicted the appellants on all counts and sentenced them on 08 August 2022 to imprisonments of 16 years and 10 months with a non-parole period of 13 years and 10 months.

[3] The appellants' appeal against conviction and sentence is timely.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The trial judge had summarized the facts in the sentencing order as follows.

> *1. Mr. Faizal Mohammed, the Court found you guilty of one Count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and one count of Defilement of Young Persons between 13 and 16 years of age, contrary to Section 215 of the Crimes Act and convicted to the same accordingly. Ms. Shahana Shabana Begum, the Court found you guilty of one count of Rape, contrary to Section 207 (1) (2) (a) and (3) read with Section 45 of the Crimes Act and one count of Defilement of Young Persons between 13 and 16 years of age, contrary to Section 215, read with Section 45 of the Crimes Act and convicted to the same accordingly.*
>
> *2. It was proved at the conclusion of the hearing that both of you had obtained the trust and confidence of the two young Complainants, the First Complainant was 12 years old, and the Second Complainant was 15 years old at that time when they came to your place, initially with their mother, who worked for you as a housemaid and then by themselves on your invitation. Two of you had delicately but manipulatively groomed the two young Complainants. They were not in a position to refuse your proposition to participate in these scandalous sexual*

activities but to hesitantly submit themselves due to the soft but scheming pressure inserted on them, especially by the Second Accused. Having obtained their participation in that manner, Ms. Shahana Shabana Begum, you had accompanied the First Complainant to the bedroom, where the First Accused was waiting. Mr. Faizal Mohammed, you then penetrated the vagina of the First Complainant, who was under the age of 13 at that time, with your penis. Ms. Begum, you were present beside the bed, assisting your husband.

3. In the same manner, you had taken the Second Complainant to the bedroom on another occasion where Mr. Faizal had penetrated the vagina of the Second Complainant with his penis. It was further proved that two of you had continuously committed these crimes against the two Complainants on several occasions. The First Complainant stated that it had happened approximately 20 times. The Second Complainant testified that it occurred nearly ten times.

[7] The grounds of appeal urged by the appellants are as follows.

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and in fact in not conducting a 'competency inquiry' required by section 10(1) of the Juveniles Act before a child can give evidence to ascertain whether the child could give sworn evidence and if not unsworn evidence. In the appellants case the complainants were juvenile and as such failure to do so caused a substantial miscarriage of justice.

Ground 2

THAT the Learned Trial Judge erred in law and in fact in stopping/preventing the counsel for the accused to cross-examine witnesses and instead directing to submit those issues and in doing so such conduct obstructed the appellants counsel in rendering his professional advice to his clients, the appellants, in doing so the learned trial judge's conduct lead to an unfair trial and caused a substantial miscarriage of justice.

Ground 3

THAT the Learned Trial Judge erred in law and in fact by excessively interfering with examination-in-chief and cross examining the state witnesses, which led to the appellants not having fair trial and hence a substantial miscarriage of justice.

Ground 4

THAT the Learned Trial Judge's conduct in assisting the state in the conduct of the trial and filling the gaps of the prosecution's case showed actual bias and/or reasonable apprehension of bias and/ or perception of bias that caused substantial miscarriage of justice.

Ground 5

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

Ground 6

THAT the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the complainants and as such there has been a substantial miscarriage of justice.

Ground 7

THAT the Learned Trial Judge erred in law and in fact in misdirecting and/or not properly and/or sufficiently himself specifically on the prosecution/defence evidence.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he accepted that "The doctors evidence support the claim of 2 complainants that they had been engaged in penetrative sexual intercourse with the 2 accused persons on more than one occasion" when the medical report can only confirm sexual intercourse and not the person who had sexual intercourse.

Ground 9

THAT the Learned Trial Judge erred in law and in fact in not permitting the appellants counsel or granting leave to cross-examine the complainants' experience of sexual nature with other person and as such there was a miscarriage of justice.

Sentence

Ground 10

THAT the Learned Trial Judge erred in law and in fact in not taking into relevant consideration the time the appellant had spent in custody.

Ground 11

THAT the Learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the appellants.

Ground 1

[8] The appellants' argument is based on section 10 (1) of the Juveniles Act and they allege that the trial judge had failed to carry out a competency test leading to a substantial miscarriage of justice. Neither of the complainants were under 14 years of

age at the time of giving evidence. Considering a similar concern, I said in **Chandra v State** [2023] FJCA 233; AAU110.2022 (30 October 2023)

> *'[8] Given her date of birth as 26 December 2005, at the time of giving evidence (22 October 2022), MMS (the complainant) was 17 years, 09 months and 07 days old. By no stretch of imagination, could MMS be considered a 'child of tender year'. The appellant has not adduced any reasons as to why the trial judge should have formed an opinion that MMS did not understand the nature of the oath and embarked on a 'competency test' with regard to MMS. For obvious reasons, neither counsel was of that view either. According to Juveniles Act, 'child' means a person who has not attained the age of fourteen years. Thus, MMS was not a child of tender years when she gave evidence. Nor MMS's evidence taken without an oath. She gave evidence under oath. Section 10(1) of the Juveniles Act does not seem to have been of any application here.*

[9] In addition, both the competency inquiry and requirement for corroboration for child witnesses in criminal proceedings are invalid under section 2(2) of the Constitution (vide **Kumar v State** [2015] FJCA 32; AAU0049.2012 (4 March 2015). Thus, there is no compulsory 'competency test' on a child witness any longer. The basis for this ground of appeal is incomprehensible and the ground of appal itself is frivolous.

Ground 2, 3 and 4

[10] The gist of the complaint is undue or excessive interference by the trial judge in the conduct of the trial. The Court of Appeal extensively dealt with a similar complaint in **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022) and said that

> *'[27] A judge has not only the right but also the duty to put questions to a witness in order to clarify an answer or to resolve possible misunderstanding of any question by a witness put to him by counsel and even to remedy an omission of counsel by putting questions which the judge thinks ought to have been asked in order to bring out or explain relevant matters. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put he can intervene to see that deficiency is made good. It is generally more convenient to do this when counsel has finished his questions or is passing to a new subject. The nature and extent of a judge's participation in the examination of a witness is a matter within his discretion which must be exercised judicially. The judge should keep the scales of justice in even balance between the State and the accused. See **R.v. Darlyn** (1946) 88 C.C.C. 269; **Yuill v Yuill** [1945] 1 ALL E.R.183 (C.A.). However, it is wrong for a judge to descend*

*into the arena and give the impression of acting as advocate (vide **R v. Flulusi** (1973) 58 Crim. App R378, 382).'*

[11] The appellants' counsel has not shown specifically in which areas of the trial proceedings the judge has allegedly exceeded the permissible limits. Thus, without trial proceedings, this complaint cannot be even raised or examined at this stage.

Ground 5 and 6

[12] The appellants' grievance is that the trial judge had not adequately addressed the inconsistencies in the police statements.

[13] However, it looks as if those so called inconsistencies found in the police statements have not been ventilated at the trial proper or witnesses have been challenged to explain them. Thus, they continue to remain as just police statements and are not to be treated as inconsistencies as far as the appellate review is concerned. The trial judge had not found any contradictions in the course of the trial except in the defense evidence.

Ground 7

[14] The criticisms leveled here overlap those of 5th and 6th grounds of appeal. As far the delay is concerned, the trial judge had indeed dealt with it at paragraphs 42-49.

Ground 8

[15] This ground of appeal has no merit at all, for the totality of the context of impugned paragraph 53 is as follows.

53. The Doctor's evidence supported the claim of the two Complainants that they had been engaged in penetrative sexual intercourse with the two Accused persons on more than one occasion. Furthermore, the two Complainants narrated the event in their evidence descriptively and coherently. They were not evasive but showed distress while elaborating on the events they had encountered.

[16] The identities of the appellants were not established by medical evidence but by direct evidence of PW1 and PW2. Paragraph 53 should be understood in that context.

Ground 9

[17] The appellants submit that the trial judge was wrong to have refused the trial counsel to cross-examine the complainants of their past sexual experience with other persons as permitted by section 130 of the Criminal Procedure Act, 2009.

[18] The respondent has submitted that the trial counsel had not sought permission to avail himself of the opportunity under section 130 prior to embarking on this exercise but when intercepted many a time by the judge, made an application which at paragraph 50 of the judgment had been described by the trial judge who eventually refused it for lack merit.

> *50. The two Accused persons alleged that the two Complainants made up this false allegation because they wanted to avenge. The learned Counsel for the Defence attempted to adduce evidence of particular experience of sexual nature of the Second Complainant with another person, which the Court disallowed under Section 130 (2) (a) of the Criminal Procedure Act. It was intolerable to witness that the learned Counsel for the Defence, irrespective of continuous warning and directions given by the Court, continuously attempted to adduce such evidence of the Second Complainant without obtaining the leave of the Court pursuant to Section 130 (2) of the Criminal Procedure Act. Unfortunately, this appalling conduct of the learned Counsel for the Defence exceeded the limit of fairness and professionalism; hence, the Court had no option but to stop him from asking such questions.'*

Ground 10 and 11(sentence)

[19] The trial judge had indeed discounted the period of remand at paragraph 19 of the sentencing order and the counsel for the appellants has not pointed out what provision/s of the Sentencing and Penalties Act the trial judge had ignored in the matter of sentence.

[20] Thus, none of the grounds of appeal against conviction and sentence has a reasonable prospect of success in appeal.

Law on bail pending appeal.

[21] 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)].

[22] 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.

[23] 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'.

[24] I have already held that there is no 'reasonable prospect of success' of the appeal and therefore, the requirement of 'very high likelihood of success' for bail pending appeal is not satisfied.

Orders

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

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