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

CRIMINAL APPEAL NO: AAU0072/2016
[Magistrates' Criminal Case No.106/2015]

BETWEEN	:	**JOSUA NIUMATAIWALU**	***Appellant***
AND	:	**THE STATE**	***Respondent***

Before	:	**Hon. Mr. Justice Daniel Goundar**
Counsel	:	**Mr. E. Moapa for the Appellant** **Ms P. Madanavosa for the Respondent**
Date of Hearing	:	**25 November 2016**
Date of Ruling	:	**30 November 2016**

RULING

[1] This is a timely application for leave to appeal against both conviction and sentence under section 21(1) of the Court of Appeal Act, Cap. 12. The appellant also seeks bail pending appeal. Section 35(1) of the Court of Appeal Act, Cap. 12 gives a single judge power to grant leave and bail pending appeal.

[2] The appellant pleaded guilty to the charges in the Magistrates' Court exercising an extended jurisdiction. He was represented by legal aid when he entered the guilty pleas. On 27 April 2016, the learned Magistrate sentenced the appellant as follows:

> Count 1 – Act with intent to cause grievous bodily harm – 2 years' imprisonment
> Count 2 – Assault occasioning actual bodily harm – 12 months' imprisonment
> Count 3 – Annoying any person – 6 months imprisonment

[3] All terms were made concurrent. The total effective sentence was 2 years' imprisonment.

[4] The grounds of appeal are:

Appeal Against Conviction

(1) That the Learned Magistrate erred in law and in fact in convicting the Appellant when the summary of facts failed to disclose the specific nature of the injuries on the victim to substantiate the offence of grievous harm.

Appeal Against Sentence

(2) That the sentence imposed by the learned magistrates is bad in fact and in law, excessive and harsh.

Other grounds of appeal

(3) That the learned magistrate erred in law and in fact when he said aggravating to this case is the use of not a beer bottle and, the fact that the complainant was defenceless against this attach, it must have cause her great alarm and fear. [at paragraph 9 of the Sentence]

(4) That the learned magistrate erred in law and in fact when he considered the remarks of Nawana J; in State vs Vilikesa Tilalevu (2010) FJH HAC 258 of 2010 (20 July 2010) rather than following the Courts policy in ordering suspended sentences to keep young offenders out of prison. [at paragraphs 17 & 18 of the Sentence].

(5) That the learned magistrate erred in law and in fact when he said that the nature of suspended sentence... and its implications to the accused if it is breached is explained to the accused [at paragraph 21 of the Sentence] when the accused was sentenced to imprisonment for 2 years.

(6) That the learned magistrate erred in law and in fact when he includes the heading PARTICULARS OF OFFENCE in all 3 (three) counts above each Statement of Offences in contravention of section 58 of the Criminal Procedure Decree.

(7) That the learned magistrate erred in law and in fact when he includes the words ...previous...., ... stoke.... and ... bodily harm.... in the particulars of offence in the first count as such particulars do not support the statement of offence of ***Act with Intent to Cause Grievous Harm.***

(8) That erred in law and in fact when he noted the injury on the complainant as bruises and cuts on her arms when the medical report and summary of facts do not show any cut on the arms. [at paragraph 8 of the Sentence]

(9) The magistrate erred in law and in fact when he said... the accused is the complainants' aunt wherein the complainant is the wife of the accused. [at paragraph 13 of Sentence]

(10) The magistrate erred in law and in fact when he failed to consider that the accused had reconciled with the complainant and failed to use his discretion under Section 154 of the Criminal Procedure Decree 2009 when the accused reconciled with the victim but imposed immediate custodial term on count 2. He also failed to show the reason he arrived to the conclusion of imposing imprisonment sentences on counts 2 and 3. [at paragraphs 14 & 15 of the Sentence].

[5] The appellant's main contention is that the charge of act with intent to cause grievous harm is defective. The appellant was charged contrary to section 255(a) of the Crimes Decree 2009. The particulars of the charge alleged that the appellant 'on the 25th day of December 2014, at Nasinu in the Central Division with intent to Cause Grievous Harm to Asinate Kotoisuva Ritova stroke an empty bottle of Fiji Gold beer on Asinate Kotoisuva Ritova's causing bodily harm'.

[6] Section 255(a) of the Crimes Decree 2009 states:

> A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—
> *(a)* unlawfully wounds or does any grievous harm to any person by any means

[7] Section 4 of the Crimes Decree states that:

> grievous harm" means any harm which—
> *(a)* amounts to a maim or dangerous harm; or
> *(b)* seriously or permanently injures health or which is likely so to injure health; or *(c)* extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;

[8] In the present case, while the charge alleged that the appellant with intent to cause grievous harm to the victim stroke an empty bottle, the harm that was caused was bodily harm. In other words, the charge did not allege that any grievous harm was caused to the victim. The issue whether the charge is defective is a question of law only. Leave is not required. The appeal may proceed as of right under section 21(1) of the Court of Appeal Act, Cap. 12 on a ground of appeal that involves a question of law only.

[9] The facts tendered by the prosecution in support of the charge of act with intent to cause grievous harm was that the appellant approached the victim and hit her head with an empty Fiji Gold bottle. The facts stated 'he wacked the bottle 3 times on the complainant's head'. The facts stated that the medical examination noted the following injuries to the victim:

- Blackish red bruises on right and left shoulders.
- Blackish red bruises on left upper harm.
- Left ear lobe swelling.
- Left eye penohital swelling.
- 3cm laceration on left upper eye brow.
- Tenders on the left panoto occiput region.

[10] The injuries mentioned in the facts, in my judgment, constitute bodily harm, but not grievous harm. At the hearing, counsel for the State was unable to point out to the facts that constituted grievous harm in order to sustain the charge of act with intent to cause grievous harm. So there is an arguable ground that not only the charge is defective but also bad in law.

[11] The next question is whether there is an arguable error in the sentencing discretion of the learned Magistrate. Ground 2 allege that the sentence is bad in fact and in law, excessive and harsh. Under this ground, counsel for the appellant submits that the

learned Magistrate failed to comply with section 18 of the Sentencing and Penalties Decree 2009 when he did not fix a non-parole period for the appellant. The appellant is fortunate that the learned Magistrate did not fix a non-parole period, because if he had done so, he would have had to fix a period that was more than two thirds of the total head sentence.

[12] The error alleged in ground 3 is a technical error. The learned Magistrate's remark that 'aggravating this case is the use of not a beer bottle' was obviously a typographical error. The appellant did not dispute that he had assaulted the victim with an empty beer bottle. The use of an empty bottle as a weapon on a defenceless woman was an aggravating factor in this case.

[13] I am not sure why the appellant thinks a suspended sentence was justified on the ground that he was a young offender. The appellant was 24 years old and a police officer when he assaulted his wife. In my judgment, he was a matured man who fully appreciated the criminality involved in assaulting his wife.

[14] Like ground 3, grounds 5, 6, 7, 8 and 9 are technical mistakes. I am not convinced that the technical mistakes affected the sentencing discretion of the learned Magistrate.

[15] The appellant's final complaint is that the learned Magistrate failed to consider reconciliation under section 154 of the Criminal Procedure Decree 2009. Section 154(6) states that reconciliation procedure does not apply to offences of domestic violence. The offences in the present case are categorized as domestic violence offences under the Domestic Violence Decree 2009. For that reason, the learned Magistrate had no obligation to promote reconciliation between the appellant and the victim.

[16] The next question is whether I should grant the appellant bail pending appeal. I bear in mind that in the case of the appellant, the presumption in favour of granting of bail is displaced following his conviction and sentence. Section 17(3) of the Bail Act states that the court must consider the following factors:

(a) The likelihood of success in the appeal;
(b) The likely time before the appeal hearing;
(c) The proportion of the original sentence which will have been served by the appellant when the appeal is heard.

[17] Section 17 (3) factors are not an exhaustive list. Section 17(3) factors are an extension of the well recognized common law practice that 'bail pending appeal should only be granted where there are exceptional circumstances' (*Apisai Vuniyayawa Tora and Others v R* (1978) 24 FLR 28, *Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Viliame Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015). The burden is on the appellant to show that exceptional circumstances exist, namely, circumstances which drive the court to the conclusion that justice can only be done by granting bail (*Sachida Nand Mudaliar v The State* Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P).

[18] Returning to section 17(3), the appellant is serving a total sentence of two years' imprisonment. So far he has served seven months of his total sentence. The next Court of Appeal session commences in February 2017. However, it is very unlikely that this appeal can be heard in the February 2017 session.

[19] In deciding the likelihood of success in the appeal, I bear in mind that it is for the appellant to show that his appeal on the face of it has every chance of success (*Seniloli & Others v The State* Cr App No. AAU0041/04S; 23 August 2004), or that there is a very high likelihood of success (*Zhong*, supra and *Tiritiri*, supra). I am convinced that the ground of appeal concerning defective charge has a very high likelihood of success. I have reached this conclusion on the basis that both the charge and the facts presented by the prosecution make reference to only bodily harm and not any grievous harm. If the Full Court finds the charge was defective and a nullity, the Court would have no option but to set aside the conviction and sentence for act with intent to cause grievous harm. That course, if taken by the Full Court, would not affect the convictions and sentences for assault occasioning actual bodily harm and annoying a person. The total sentence for these two offences is 12 months' imprisonment. It is very likely that the appellant would serve the 12 months before his appeal is heard, thus, defeating the purpose of bringing this appeal.

[20] Taking all these matters into account, I am satisfied that this is a case where bail should be granted.

Result

[21] The appellant may proceed with his appeal against conviction as of right under section 21(1) of the Court of Appeal Act, Cap. 12.

Leave to appeal against sentence is refused.

The appellant is released on bail pending appeal on the following conditions:

(i) Post $500.00 cash bond.

(ii) Provide a fixed residential address and not to change that address without informing the Court of Appeal registry.

(iii) Attend all hearings in this matter.

(iv) Comply with the DVRO issued by the Magistrates' Court.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Babu Singh & Associates for the Appellant
Office of the Director of Public Prosecutions for the State