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

CRIMINAL APPEAL NO: AAU0071 of 2016
[High Court Case No: HAC149 of 2014]

BETWEEN : **NITENDRA PRASAD BILASH**

Appellant

AND : **THE STATE**

Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr I Khan for the Appellant Ms P Madanavosa for the Respondent
Date of Hearing	:	17 March 2017
Date of Ruling	:	22 March 2017

RULING

[1] The appellant was charged with digital rape of a juvenile girl. Following a trial in the High Court at Suva, the three assessors gave their opinions that the appellant was not guilty of the charge. The trial judge disagreed and in a written judgment convicted the appellant of rape and sentenced him to 9 years, 11 months and 14 days imprisonment with a non-parole period of 7 years, 11 months and 14 days. This is a timely application for leave to appeal against both conviction and sentence pursuant to section 21(1) of the Court of Appeal Act, Cap. 12. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr. App. No. CAV0010 of 2013; 20

November 2013). The test for leave to appeal against sentence is whether there is an arguable error in the sentencing discretion (*Naisua v State* unreported Cr. App. No. CAV0010 of 2013; 20 November 2013).

[2] Briefly, the facts were that on 22 July 2013, the appellant invited the victim to his home to baby sit his child. The victim was 16 years old. Her mother dropped her off at the appellant‟s house in the morning. Occasionally, the victim‟s parents did paid house chores for the appellant. When the appellant returned home, he went and sat beside the victim, while the appellant‟s child was in the shower. The appellant removed the victim‟s pants and the underwear and penetrated her vagina with his fingers without her consent. As a result, the victim‟s hymen was ruptured. She managed to push the appellant away and at that point he got up and went away. When the victim‟s mother returned in the afternoon to the appellant‟s house, she observed that the victim was distressed. When they returned to their home, the victim told her mother that she was sexually assaulted by the appellant. The matter was reported to police.

[3] Counsel for the appellant advances the following grounds of appeal:

1. THAT the Learned Trial Judge erred in law and fact by failing to consider the medical evidence which stated that the injury appeared to have occurred within 24 to 28 hours and the doctor further defining in his evidence under oath that he should have stated that the injury has occurred within the last 48 hours from the time of the examination, thereby implying that the injury was possibly 2 days old.

2. THAT the Learned Trial Judge erred in law and fact in not accepting that the injuries sustained could be self-inflicted, therefore there was a reasonable doubt as to whether it was the Appellant who had caused the injuries to the Complainant.

3. THAT the Learned Trial Judge erred in law and fact in not accepting that the injuries sustained could be self-inflicted, therefore there was a reasonable doubt as to whether it was the Appellant who had caused the injuries to the Complainant.

4. THAT the Learned trial Judge erred in law and fact in not considering that had the Appellant intended to commit the offence, he could have chosen the more probable venues, which were the 3 bedrooms in the house rather than choosing the sitting room to be fully exposed to the Appellant‟s 10 year old daughter and an uninterrupted access to the daughter at anytime.

5. THAT the Learned Trial Judge misdirected himself and contracted himself in accordance with the directions given in his summing up at (paragraph 8) when assessing the testimony of a witness.
   THAT the Learned Trial Judged erred in law and fact in holding that the evidence given by the 2nd Defence Witness, Nisha Neha Bilash was not credible and that the demeanor at the time she gave evidence was not acceptable and failing to c consider the age of the witness at the time of giving evidence, in that she was clearly facing the Trial Judge, all the counsels, the assessors and the Appellant throughout the entire time that she gave evidence, hence eye contact with the Appellant could not be avoided at the material time, and further that she gave clear answers to the questions asked and also, that similar type of demeanor was portrayed by the Doctor when she gave evidence in that there were long pauses before he answered the questions and he took longer time to give h is answers despite being a professional and deemed to have sufficient knowledge of the injuries in question and who looked down most of the time at the time of answering questions.

6. THAT the Learned Trial Judge erred in law and in fact in not directing himself when finding that the evidence of the Complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to police and the she gave to the medical doctor. Failure to direct himself on previous inconsistent statement in law of the complainant cause substantial miscarriage of justice.

7. THAT the Learned Trial Judge erred in law and fact in accepting the evidence of the Complainant when she said in re-examination that the reason she did not tell the police about the Appellant kissing her breast was because she was scared and ashamed when it ought to hold that such an explanation was least probable in light of fact that she was without any hesitation able to tell the police about the alleged penetration in her vagina by the Appellant, and therefore the Complainant‟s version of the whole situation ought not be believed.

8. THAT the Learned Trial Judge erred in law and fact in holding the Complainant as a credible witness and not taking into account that on one hand the Complainant gave evidence that the Appellant had forced her pants down and held her tight and committed the offence whilst she was sitting down and held her tight and committed the offence whilst she was sitting down, whilst on the other hand she admitted that her clothes buttons were not broken, her clothes were still in good condition when her mother came to take her at 5.00 pm, she did not have any bruises or marks over her hands or waist area, and she did not shout even to raise alarm for Neha Nishika Bilash to hear who was right inside the house or to the neighbours, whose house were just 2 to 3 meters away.

9. THAT the Learned trial Judge erred in law and fact in holding that the offence was committed by the Appellant when the Appellant‟s daughter was having her bath, without any cogent proof evidence and not accepting the daughter‟s evidence when she said that she never went for a bath whilst the Complainant was at their home between 4.00 pm to 5.00 pm.

10. THAT the Learned Trial Judge erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasoning.

11. THAT the Learned Trial Judge erred in law and fact in holding that Neha Nishika Bilash‟s evidence was inconsistent and unreliable when Neha stated that she did not see her father put the bag on the dining table and taking out food, and also when she said her father was still eating when the Complainant‟s mother came whereas the Appellant‟s version was that he had already eaten before the Complainant‟s mother came, and failing to consider that whatever happened in the kitchen was irrelevant and that the main issue was as to whether the incident as alleged by Complainant occurred in the sitting room during that time. The Learned Trial Judge misdirected and contradicted himself in his summing up paragraphs 9, 10 and 11.

12. THAT the Learned Trial Judge erred in law and fact in overturning the unanimous decisions of the Assessors of Not Guilty and failing to consider that the facts of the case and the evidence given by each of the witness clearly indicated that the Complaint by the Complainant was highly likely to be falsely made.

13. THAT the Learned Trial Judge erred in law and in fact in misdirecting himself when he stated that "I observed the demeanor of the complainant when she gave evidence. I did not note any attempt by her to exaggerate. In my view, she gave honest answers" relying only on the demeanor of the Complainant and not whole evidence as a whole caused a substantial miscarriage of justice.

14. THAT the Learned Trial Judge did not direct himself and take into consideration the evidence of the Medical Practitioner that there could be possibility that the complainant did not suffer any injuries as during the complainant‟s examination no injuries were found and as such there is possibility that no injury was caused to her.

15. THAT the Learned Trial Judge did not consider/ analyze the Defence case adequately/or in detail in particular the evidence of the Accused‟s daughter who was present in the room with the victim but did not see the Appellant committing the offence as charged. In the circumstances there was a substantial miscarriage of justice.

16. THAT the Learned Trial Judge erred in law and in fact in not directing himself when finding the Appellant guilty that when the Appellant was called at the Police Station he was not interviewed on the same day. The Police Officers told the Appellant that he would be interviewed later and despite the fact the Appellant requested that it was getting late night and he requested the Police Officers to take the Complainant for medical examination same night because he was concerned that the Complainant will go and do something to herself and thereafter blame the appellant by not doing so there was a substantial miscarriage of justice as it created serious doubts of self inflicted injuries by the Complainant.

17. THAT the Learned Trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors of Not Guilty did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.

18. THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.

19. THAT the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it.

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

21. THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting/considering the Appellant‟s case to the Prosecutions and Defence evidence.

22. THAT the Learned Trial Judge while correctly directing the assessors in paragraph 5 of his Summing Up that "**You must not speculate about what evidence there might have been"** misdirected himself and erred in law and in fact in speculating when he stated in his Judgment Paragraph 26 that **"The defence counsel attempted to paint the picture that the complainant was poor, she wears short and tight fittings and she made this complaint in order to claim money from the accused. The unanimous in order opinion of the assessors that the accused is not guilty shows the defence counsel has in fact been successful in painting that picture in the minds of the assessors. In my view that picture had prejudiced the assessors mind against the complainant and the assessors failed to comprehend that those facts are not relevant in deciding whether the accused is guilty or not guilty of the offence charged."**

23. THAT the Learned Trial Judge erred in law and in fact by finding the Appellant guilty of the offence charged contradicted himself in his summing up at paragraph 67 when he gave inter alia 3 options:-

    (i) You may believe his expectations and, if you believe him, then your opinion must be that the accused is „not guilty‟.

    (ii) Without necessarily believing him you may think, „well what he says might be true‟. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be „not guilty‟.

    (iii) The third possibility is that you reject his evidence, But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is „guilty‟ of the offence.

That despite the above directions the 3 assessors found the appellant not guilty and the the Learned Trial Judge by overturning their unanimous opinion of not guilty and without giving cogent reasons had caused a substantial miscarriage of justice.

24. THAT the Appellant reserves the right to appeal such further and other Grounds as the Appellant may be advised upon the receipt of the Court Record.

APPEAL AGAINST SENTENCE

25. THAT the Appellant relies on Grounds 1 to 23 stated herein above.

26. THAT the Learned Trial Judge erred in law and fact in ordering a sentence of 9 years 11 months and 14 days with parole of 7 years 11 months and 14 days, which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.

27. THAT the Learned Trial Judge erred in law and fact in considering that the Police Officer had cooperated with the Appellant in allowing him more time during the investigation process when it ought to have considered that it was the Appellant who had cooperated with police for some 10 months, that was since the date of the complaint, until the time the Appellant was charged by Police, and therefore this factor ought to be considered as a ground for mitigation whilst passing the sentence.

28. THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

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

[4] At the hearing, both parties relied upon their respective written submissions. Unfortunately, a substantial part of the appellant‟s submissions deal with the test for leave to appeal. Without making submissions on each ground of appeal, counsel for the appellant submits that the grounds are arguable and have strong prospects of success for leave and bail to be granted.

[5] The victim was medically examined a day after the alleged incident. The examining doctor found that the victim‟s hymen was ruptured. The doctor‟s opinion was that the injury had occurred within the last 48 hours from the time of the examination. The doctor said that the injury could have been caused by a penis, finger or a foreign object penetrating the vagina vigorously. The doctor also said that there was a

possibility that the injury could be self-inflicted but it would be very painful. The learned trial judge fairly summarized the medical evidence in his summing-up. At the end of the day, the medical evidence did not implicate the appellant. The learned trial judge convicted the appellant because he believed the victim was telling the truth when she said the appellant had penetrated her vagina with his fingers. Grounds one, two, three and fourteen are unarguable.

[6] Grounds four and sixteen are speculative and unarguable.

[7] There is no contradiction in the manner in which the learned trial judge dealt with the testimony of the appellant‟s daughter. In paragraphs 12, 13 and 23 of the judgment, the learned trial judge gave reasons why he chose not to give much weight to the evidence of the appellant‟s daughter. Grounds five, nine, eleven and fifteen are unarguable.

[8] The inconsistencies in the evidence of the victim were dealt in the summing-up and in paragraphs 16 and 17 of the judgment. The learned trial judge did not find the inconsistencies material. He found the victim to be a credible witness despite the inconsistencies. Grounds six, seven and eight are unarguable.

[9] The learned trial judge dealt with the appellant‟s evidence in paragraphs 11 and 20 of the judgment. The learned trial judge gave cogent reasons for not believing the appellant‟s evidence. Ground ten is unarguable.

[10] The learned trial judge gave detailed reasons for not accepting the opinions of the assessors. The reasons given for convicting the appellant are cogent. I think both the summing-up and the judgment are impeccable. Grounds twelve and seventeen to twenty-three are unarguable.

[11] The learned trial judge did not misdirect when he found the victim to be an honest witness based on her demeanour when she gave evidence. Ground thirteen is unarguable.

[12] The sentence of 9 years, 11 months and 14 days for rape of a juvenile girl in a contested case is on the lower end of the tariff for rape (*Raj v State* unreported CAV003.2014; 20 August 2014). The learned trial judge"s assessment of the aggravating and mitigating factors was correct. I am not convinced that there is an arguable error in the exercise of the sentencing discretion.

[13] For these reasons, I refuse leave to appeal against conviction and sentence.

[14] The test for bail pending appeal is more stringent. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. The Bail Act 2002 specifically requires the court to consider the following factors when considering bail pending an appeal:

(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.

[15] The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015).

[16] It therefore follows that the two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (*Seniloli & Others v The State* unreported Cr App No. AAU0041/04S; 23 August 2004). So far the appellant has served ten months of his sentence.

[17] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). None of

the matters advanced by the appellant constitutes exceptional circumstance especially when the appellant has failed to satisfy the threshold of a very high likelihood of success in appeal (*Silatolu v The State* unreported Cr App No. AAU0024 of 2003; 27 September 2004). For these reasons, the application for bail fails.

[18] **Result**

Leave to appeal against conviction and sentence is refused.

The application for bail pending appeal is refused.

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The Hon. Mr. Justice Daniel Goundar

JUSTICE OF APPEAL

Solicitors:

Iqbal Khan & Associates for the Appellant

Office of the Director of Public Prosecutions for the Respondent