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

CRIMINAL APPEAL NO: AAU0158 of 2016
[High Court Case No: HAC120 of 2015]

BETWEEN : **JAMES ANTHONY NAIDU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Daniel Goundar**

Counsel : **Ms. S. Vaniqi & Ms. B. Malimali for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing: **21 June 2017**

Date of Ruling: **29 June 2017**

RULING

[1] Following a trial in the High Court at Lautoka, the appellant was convicted of two counts of rape and sentenced to 11 years, 11 months imprisonment with a non-parole period of 9 years. He seeks leave to appeal against both conviction and sentence, and bail pending appeal.

[2] The brief facts were that the appellant was a businessman and a family friend of the complainant. At the time of the offending, the appellant owned a motel in Lautoka. The victim was a 16-year old girl. She was a high school student. She accompanied her friend, Sara and another male companion to the seawall at Marine Drive in the appellant's vehicle to discuss holiday job opportunities at his motel. Liquor was bought. The appellant paid for the liquor. All except the appellant drank alcohol at the seawall.

[3] After a while, the complainant accompanied the appellant to another secluded location in his vehicle while her friend and the other male companion remained at the seawall. When they arrived at the secluded location, the appellant forced the complainant to perform oral sex on him and penetrated her vagina with his finger without her consent. He stopped after he got distracted by a mobile phone call. They returned to Marine Drive. He told her to return to the back seat of the vehicle and not to tell anyone about the incident. She was dropped off at her home. The next morning, the complainant told her friend, Janet about the alleged incident.

[4] Initially, the appellant advanced numerous grounds of appeal. At the hearing of this application, the grounds of appeal were summarised into three complaints against conviction and one complaint against sentence. The appeal is governed by section 21(1) of the Court of Appeal Act, Cap. 12. Under 21(1) (a), an appeal may lie as of right on any question of law alone. Under section 21(1) (b) and (c), leave is required to appeal on any ground of mixed law and fact, or fact alone, or to appeal against sentence.

[5] The test for leave to appeal on a ground of mixed law and fact, or fact alone is whether the ground 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 exercise of the sentencing discretion (*Naisua v State* unreported Cr. App. No. CAV0010 of 2013; 20 November 2013). Section 35(1) gives a single judge power to grant leave. A single judge also has power to grant bail pending appeal.

[6] The test for bail pending appeal is more stringent than the test for leave. 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.

[7] 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). 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). 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).

Whether the trial miscarried when an assessor allegedly did not disclose that she resided in the same neighbourhood as the complainant?

[8] This ground involves a question of mixed law and fact. Shortly after the trial judge had delivered his judgment convicting the appellant of the charges, the appellant through his trial counsel moved the court for arrest of judgment pursuant to section 239(1) of the Criminal Procedure Decree and the inherent jurisdiction of the court. The notice of motion was supported by an affidavit from the appellant's spouse. In the affidavit the deponent stated that it had come to their attention that one of the assessors was a very close neighbour of the complainant and if that information is correct then the appellant has not received a fair trial as this particular assessor would have known the complainant.

[9] In a written ruling, the learned trial judge refused the application for want of jurisdiction. The learned trial judge quite correctly said that the application was misconceived as far as section 239(1) was concerned because that section only allows for arrest of judgment when the information does not state any offence which the court has power to try. No case law was cited by the appellant's trial counsel to support the contention that the application could be heard under the inherent jurisdiction of the High Court.

[10] The application that was made in the High Court could have been framed with much more clarity. The relief that the appellant was seeking through the application was

confusing. For example, the deponent stated 'that there be an arrest of Judgment/Sentencing pending the determination of this here application' and 'that the Applicant be admitted to bail pending the determination of this here application'. Further, the application was founded on speculations. In the affidavit the deponent herself was unsure whether the information that they received that the assessor concerned was a close neighbour of the complainant was correct. The deponent did not disclose the source of her information.

[11] Ms Vaniqi submits that the learned trial judge should have ordered a mistrial after being aware that the assessor concerned misled the court by failing to disclose her correct residential address and that she resided on the same street as the complainant. There are a number of problems with Ms Vaniqi's submission. Firstly, there was no evidence that the alleged assessor conducted improperly at any stage of the trial when performing her duty as an assessor. Secondly, there was no valid ground to order a mistrial. Thirdly, the appellant did not seek a mistrial. He applied for arrest of judgment, which the trial judge dismissed for want of jurisdiction.

[12] Although the assessors unanimously found the appellant guilty of the charges, the learned trial judge convicted the appellant based on his own assessment of the evidence. In Fiji, the trial judge is the final adjudicator of the facts. In the present case, the learned trial judge found the appellant guilty based on his own findings of credibility of witnesses and upon facts established by evidence led in the trial. The question whether the trial miscarried when an assessor allegedly did not disclose that she resided in the same neighbourhood as the complainant is not arguable.

Whether the trial judge should have warned the assessors to approach the complainant's uncorroborated evidence with caution?

[13] It is not in dispute that the appellant was convicted solely upon the uncorroborated evidence of the complainant. Ms Vaniqi submits that a warning is still required in sexual cases to approach the complainant's uncorroborated evidence with caution in order to avoid a perceptible risk of a miscarriage of justice. Ms Vaniqi cites Australian

cases to support her argument. The cases are not helpful. They were decided before the common law practice of warning the jury to approach the uncorroborated evidence of the complainant in a sexual case with caution was abolished by statute in Australia. That common law practice has also been abolished in Fiji by virtue of section 129 of the Criminal Procedure Decree.

[14] Credibility of the complainant was a live issue at the trial. The assessors were accordingly directed to consider credibility of the complainant before relying on her evidence to convict the appellant. The question whether the trial judge was required to warn the assessors to approach the uncorroborated evidence of the complainant with caution is not arguable and is frivolous.

Whether the trial judge erred in declaring Janet a hostile witness?

[15] Janet was a prosecution witness. She was the complainant's friend. The prosecution called Janet to adduce recent complaint evidence. Janet gave evidence that the complainant told her about the sexual incident with the appellant and that the complainant appeared sad when she was relaying the incident to her. After giving evidence, Janet sent a letter advising the registry that she was retracting her evidence. The letter was quite rightly brought to the attention of the learned trial judge. Upon seeing the letter, the learned trial judge recalled Janet as a witness. Janet was questioned by the trial judge in the presence of the assessors regarding the letter she had sent to the registry. She told the court that she was retracting her evidence because the complainant had admitted to her that the allegation of rape against the appellant was false. Janet explained that she tried to retract her police statement but was not allowed to do so.

[16] Ms Vaniqi submits that Janet should not have been declared a hostile witness in the presence of the assessors but in a voir dire upon an application. While a voir dire is an appropriate forum to hear an application for declaring a witness hostile, the procedure is not mandatory. In *Sheik Mohammed v State* Cr App No. AAU0002 of 2010, the Court said at [32]:

Whether to hold a voir dire or not will always depend on the circumstances of the each case. If there is a possibility of the assessors hearing prejudicial evidence that is eventually going to be excluded, then the risk of injustice from occurring is averted by holding a voir dire in the absence of the assessors to determine the admissibility of evidence.

[17] In the present case, Janet's retraction of her earlier evidence was prejudicial to the prosecution and her new evidence that the complainant had admitted to her that her allegation of rape against the appellant was false was favourable to the appellant. The parties were given an opportunity to question Janet on her retraction of her earlier evidence and also on her new evidence.

[18] Another prosecution witness who retracted from her police statement was Sara. Sara gave evidence supporting the appellant's evidence. Both the prosecution and the defence cross-examined Sara in the presence of assessors. Sara gave evidence favourable to the appellant. The assessors did not hear any inadmissible prejudicial evidence. These circumstances did not call for a voir dire procedure to declare the witnesses hostile. The question whether the witnesses were properly declared hostile by the learned trial judge is not arguable.

Whether there is an error in the exercise of the sentencing discretion?

[19] The complainant was a child when the appellant raped her. The tariff for child rape is 10-16 years imprisonment (*Raj v State* Cr App No CAV0003 of 2014). All relevant factors were taken into account in sentence. The term of imprisonment imposed on the appellant is within the recognised tariff for rape of a juvenile girl. There is no arguable error in the exercise of the sentencing discretion.

[20] Given my conclusion that the appeal against conviction and sentence is unarguable, the application for bail pending appeal must fail.

Result

[21] Leave refused.

Bail pending appeal refused.

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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Vaniqi Lawyers for the Appellant
Office of the Director of Public Prosecutions for the Respondent