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

CRIMINAL APPEAL NO.AAU 29 of 2020
[In the High Court at Suva Case No. HAC 93 of 2019]

BETWEEN	:	**CHRISTOPHER NARAYAN**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. N. Mishra for the Appellant**
	:	**Mr. P. Madanavosa for the Respondent**
Date of Hearing	:	**16 December 2022**
Date of Ruling	:	**19 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of murder of his 2 ½ years old daughter contrary to section 237 of the Crimes Act, 2009 and one count of common assault on his wife contrary to section 274 of the Crimes Act, 2009 on 04 March 2019 at Nakasi in the Central Division.

[2] The assessors' unanimous opinion was that he was guilty of both counts. The trial judge, however, had acquitted him of the charge of murder and common assault and convicted him only of manslaughter under section 239 of the Crimes Act, 2009. He had been sentenced on 15 May 2020 to 07 years imprisonment with a non-parole period of 05 years (the actual sentence being 05 years, 09 months and 26 days with a non-parole period of 03 years, 09 months and 26 days after the remand period was discounted).

[3] His appeal only against conviction is timely. 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)].

[4] The sentence order sets out the evidence as follows:

> *'7. Briefly, the facts of this case were as follows. The deceased was two and a half years old (two years and five months) at the time of her death. You were her biological father and the biological mother was the second prosecution witness ("PW2"). PW2 and you were separated for some time due to a dispute, but during the time material to this case the two of you were living together with the deceased and another daughter of PW2 who was younger to the deceased. You were the head of the household.*
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> *8. According to the evidence led in this case, it was established that, by 8.00pm on 04/03/19, the deceased had sustained multiple injuries on her external body and multiple bone fractures. She had a fractured jaw and her ribs were fractured on three places. She had a difficulty to eat given the fractured jaw. Given the fractures on the ribs which she had sustained approximately between 2.00pm and 8.00pm that day, she had internal bleeding which finally led to her death around 2.00am the following morning. It was evident that the two and a half year old deceased had endured immense pain and suffering at least from 8.00pm on 04/03/19 until she succumbed to those injuries around 2.00am the following day.'*

[5] PW2, the appellant's wife had testified that the appellant punched the deceased on her hand, jaw and ribs around 6.00 pm on 04/03/19. According PW1, a neighbour the appellant had been seen punching his wife PW2 and the little girl (deceased) on her

chin around 09.00 pm. and when she stood up once again punched on the left side of her ribs. The deceased had fallen backwards on the ground and remained motionless.

[6] Later she regained her consciousness but at times breathed heavily. The appellant had ignored requests by PW2 to take the deceased to hospital. Around 3.00 am the following day, the deceased's body was found to be cold and she was not breathing. Upon admission to hospital, the deceased was pronounced dead. The cause of death was massive collection of blood in the abdomen resulting from injury to the deceased's liver. Multiple fractures of both ribs caused by blunt force trauma in the form of *inter alia* punch, kick and assault had caused bleeding into the chest cavity. Blood had been collected in the deceased's body for 06-12 hours, who also had a fracture of the jaw and mouth. Time of death would have been around 2.00 am on 05 March 2019. In my view, these injuries are compatible with the appellant's assault on the deceased as described by PW1 and PW2. The appellant had denied any assault on the deceased on his part and said that PW2 hit the deceased with an iron rod on her legs and the medical evidence does not appear to have revealed any leg injuries or identified any such leg injuries with the cause of death.

[7] However, the learned trial judge had stated in the judgment:

> *'52. The prosecution has therefore failed to establish beyond reasonable doubt that the accused punched the deceased on 04/03/19 and thereby caused the death of the deceased.*
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> *53. In the circumstances, I find that the prosecution has failed to prove the first count against the accused. For the reason that I have concluded that the actus reus relevant to the offence of murder as alleged by the prosecution has not been proved, I find that the alternative offence of manslaughter in the manner the assessors were directed to consider in relation to the first count is also not established.'*

[8] In other words, the trial judge had concluded that neither murder nor manslaughter as described at paragraphs 64 of the summing-up and defined in section 239 had not been established.

[9] However, the trial judge had declared in the judgment as follows:

> *'54. As already discussed, the medical evidence led in this case establishes that there were multiple injuries on the external body of the deceased and that there were multiple bone fractures. These fractures no doubt would have caused immense pain to the deceased. The deceased was unable to eat solid food due to the fracture in her jaw. PW4 said that the internal bleeding was mainly due to the injury to the liver and not seeking medical attention. Given these circumstances and also the timeline established through the medical evidence in this case, there is no way for the accused and also for PW2 for that matter, not to be aware of this condition of the deceased in the evening on 04/03/19 (at least by 8.00pm) and to realize that the deceased needed immediate medical attention; irrespective of the manner in which the deceased sustained those injuries and irrespective of whether the accused is responsible for those injuries or not. I am mindful of the evidence given by the accused regarding the conduct of the deceased on 04/03/19 and the evidence of the second defence witness. I am unable to accept the defence evidence which suggests that the deceased did not show any sign of severe pain or distress that night.*
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> *55. I am satisfied beyond reasonable doubt that the accused omitted to take necessary steps to provide medical attention to the deceased knowing very well that the deceased needed medical attention and given the circumstances known to him he was reckless as to the risk of causing serious harm to the deceased by the said conduct. I find that this omission to provide medical treatment to the deceased, substantially contributed to the death of the deceased.*
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> *57. Therefore, though I have found that the prosecution case theory had failed, the evidence led in this case establishes beyond reasonable doubt that the accused had committed the offence of manslaughter contrary to section 239 of the Crimes Act 2009. This is the same offence the assessors were directed to consider as an alternative offence to the first count.*
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> *58. In the light of the forgoing, I am unable to agree with the unanimous opinion of the assessors on the first count. I find the accused not guilty of the first count as charged. Nevertheless, I find the accused guilty of the lesser offence of manslaughter contrary to section 239 of the Crimes Act.'*

[10] The appellant urged the following grounds of appeal before this court:

> ***Grounds of Appeal:***
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> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in convicting the appellant for manslaughter on the basis of a wrong decision on a question of law.*

Ground 2

THAT the Learned Trial Judge erred in making amendments to the judgment after the judgment had been passed by the learned trial judge.

01st ground of appeal

[11] It is clear from a reading of the totality of the judgment, in particular paragraphs 53 & 57 read with paragraph 63 & 64 of the summing-up, that the trial judge had determined that manslaughter under section 239 had not been made out but *'Manslaughter arising from a breach of duty'* under the Crimes Act, 2009 had been proved by the evidence. Therefore, it is unmistakably clear that in doing do the judge had mentioned the wrong section of 239 (manslaughter) instead of section 240 (Manslaughter arising from a breach of duty) in the judgment where he purportedly convicted him for manslaughter simpliciter under section 239. At the least, the evidence seems sufficient to justify a conviction under section 240.

[12] However, there is a question of law only in that whether the trial judge could have convicted the appellant for manslaughter arising from a breach of duty under section 240 of the Crimes Act, 2009 in terms of section 162 of the Criminal Procedure Act, 2009 considering it as a lesser or an alternative offence or in terms of section 160 considering it as a minor offence. However, interpretation given to 'minor offence' in section 02 of the Criminal Procedure Act, 2009 is that "minor offence" means any offence prescribed in the Minor Offences Act. The offences created by the Minor Offences Act are set out from sections 3 to 20 and none of them relate to an offence under section 240 of the Crimes Act, 2009. Section 160 received attention in the full court decision in **Nima v The State** AAU 0015 of 2017 (24 November 2022) but the court did not have to make a determination on it in as much as the main point of appeal was concerned with section 162 of the Criminal Procedure Act.

[13] Therefore, I allow leave to appeal on this question of law only.

02nd ground of appeal

[14] The appellant complains that the trial judge had altered paragraph 54 of the judgment after its delivery on 20 April 2020. The trial, judge had done so the following day itself and informed the parties. The amendments done are shown at paragraph 6 of the sentencing order. In my view, the additions made do not alter at all the purport of the paragraph. Nor do they materially change the substratum of it. No miscarriage of justice has occurred as a result.

[15] In **State v Miller** [2011] FJSC 7; CAV0008.2009 (15 April 2011) cited by the appellant deals with a different scenario where the judge had added to the judgment references to authorities some of which were not available to the court on the hearing of the appeal. It is in that context that the Supreme Court had remarked that case authorities decided post the decision or order cannot be added onto the judgment by way of reasons for the decision and a judgment or order cannot be perfected in such a way. In the same way a summing-up delivered in open court in the course of a trial, cannot be altered subsequently so far as content is concerned. Punctuation, spelling and minor typographical error may be excepted but mistakes of grammar or expression must remain on the record, since those were the directions actually given to the assessors when the summing up, already committed to writing, was read out. In the current appeal what had been added were already there in evidence and rest were the trial judge's observations on the need for medical attention to the deceased irrespective of who was responsible for the injuries. I see no merits in this complaint.

Law on bail pending appeal

[16] 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)].

[17] 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.

[18] If an 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'.

[19] Though the appellant is granted leave to appeal it is only on a pure question of law. The decision to that by the full court may or may not be in his favour. The full court may also decide to convict him properly under section 240 of the Crimes Act, 2009 depending on how the legal issue would be resolved. Thus, he cannot be said to be having a 'very high likelihood of success' in his appeal at this stage.

[20] I shall in any event consider the second and third limbs of section 17(3) of the Bail Act 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'* together.

[21] The appellant has so far served 02 years, 07 months and 03 days of imprisonment since being sentenced. The full sentence he has to serve is 05 years, 09 months and 26 days. In other words, he has not completed even the non-parole period and the greater portion of the sentence is left to be served.

[22] There is no danger that the appellant is likely to serve perhaps more than the whole of the sentence imposed on him after hearing the appeal in the future. Therefore, it appears that section 17(3) (b) and (c) need not be considered in favour of the appellant at this stage.

Orders of the Court:

1. Leave to appeal against conviction is allowed on the question law set out.
2. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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