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

CRIMINAL APPEAL NO.AAU 0048 of 2017
[In the High Court at Suva Case No. HAC 325 of 2015]

BETWEEN	:	**JIMILAI TAWAKEDRAU DROSE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**25 August 2020**
Date of Ruling	:	**31 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on three counts of Aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with others on 07 October 2015 at Suva and at Walu Bay, Suva in the Central Division.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: *contrury to section 311(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MATIA TUIBUA TUBAMASI QAQANIKOROVOU and JIMILAI TAWAKEDRAU DROSE *together with other persons unknown, on 07 October 2015, at Suva in the Central Division, committed theft of assorted properties belonging to Elizabeth Clayton, amounting to FJ$37,600.00, and immediately before committing theft, used force on Elizabeth Clayton.*

SECOND COUNT

Statement of Offence

AGGRAVATED BURGLARY: *contrary to section 313(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MATIA TUIBUA TUBAMASI QAQANIKOROVOU and JIMILAI TAWAKEDRAU DROSE *together with other persons unknown, on 07 October 2015, at Walu Bay, Suva in the Central Division entered into the building of Pacific Energy Service Station as trespassers with intent to commit theft therein.*

THIRD COUNT

Statement of Offence

THEFT: *contrary to section 291(1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MATIA TUIBUA TUBAMASI QAQANIKOROVOU and JIMILAI TAWAKEDRAU DROSE *together with other persons unknown, on 07 October 2015, at Walu Bay, Suva in the Central Division dishonestly appropriated cash amounting to FJ$110.00, the property of Pacific Energy Service Station with the intention of permanently depriving Pacific Energy Service Station of its property.*

[3] After the trial *in absentia*, the assessors had expressed a unanimous opinion of guilty against the appellant on all charges on 17 February 2017. The learned High Court judge in his judgment on 24 February 2017 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 28 February 2017 to 07 years and 10 months of imprisonment for the first offence with a non-parole period of 06 years and 10 months and 03 years of imprisonment as an aggregate sentence for the second and third offences; all sentences to run concurrently with effect from the

date of his arrest. He had been subsequently apprehended on 16 March 2017 upon the arrest warrant.

[4] The appellant being dissatisfied with the conviction and sentence had forwarded an appeal on 30 March 2017. The appellant had tendered an application for bail pending appeal as well on 09 November 2017. An application to abandon his appeal (Form 3) against conviction and sentence had been filed on 08 April 2019 but the appellant had changed his mind on 28 May 2019 and indicated to court that he wished to abandon only his sentence appeal and pursue his conviction appeal. Finally the appellant had tendered amended grounds and written submissions on 10 June 2020 which he relied on at the leave to appeal hearing on 25 August 2020 and on the same day he filed a fresh application to abandon his appeal against sentence in Form 3. The state had filed its submissions on 24 August 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Law on bail pending appeal

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*"[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
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> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
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> > *(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."*
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> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR*

28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v– The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[8] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[10] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for **bail pending appeal** should attempt even to comment on. They are matters for the Full Court ....."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting **bail pending appeal** as established by cases by Fiji is that it may only be granted where there are exceptional*

circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."

[14] Therefore, the legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to satisfy the requirement of exceptional circumstances. However, an appellant can rely only on 'exceptional circumstances' including extremely adverse personal circumstances even when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] 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 practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would 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'.

[17] ***Grounds of appeal against conviction:***

'Ground 1: That the evidence upon which the Appellant was convicted by the Trial Judge was flawed, inadequately, insufficient and the quality of which rendered it unsafe for the trial Court to safely convict in the absence of the Appellant.

Ground 2: *That the Learned Trial Judge erred in law by failing to give the Appellant a fair and just hearing in his absence even though it is in the interest of justice to proceed. Failure to do so have caused a gross injustice to the conviction.*

Ground 3: *That the Learned Trial Judge erred in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, giving rise to a grave miscarriage of justice.*

[18] The prosecution evidence of the case as summarised by the learned High Court judge in the judgment is as follows.

6. 'It was established through the evidence of the first prosecution witness that certain items were stolen from her house on 07th October 2015 around 3.00am and force was used on her with the intention of committing theft, immediately before and at the time of committing theft. She saw three individuals inside her house that morning and according to her, another person was already inside her car waiting for the said three individuals. Therefore, the first prosecution witness' evidence proves beyond reasonable doubt that the offence of aggravated robbery was committed around 3.00am on 07th October 2015 at her house by four persons.

7. The first prosecution witness identified the laptop tendered in evidence as PE 01 as the laptop stolen from her house that morning. She identified the car key (PE 02) which was recovered by the police during the cautioned interview of the second accused. This was the key of her car, registration number EV 735 that was also stolen during the same incident.

8. The evidence of the second prosecution witness establishes that the second accused gave him a laptop which is similar to PE 1, to have it unlocked on the same day the offence of aggravated robbery was committed at the first prosecution witness' house. The second accused admits in his cautioned interview that he gave PE 01 to the second prosecution witness to have it unlocked and that it was given to him by one of the accomplices immediately after the aggravated robbery was committed.

9. The second accused had made admissions in PE 11 to the effect that he agreed with one of the accomplices to steal money from the first prosecution witness' house and he planned with the said accomplice and two others 'about the job'. He had also admitted that he took a pinch bar from home, that he went to the first witness' compound with the others; that he started the car which was parked in the garage and waited for the others; and that he drove out with the others when they got into the car with two bags.

11. The evidence of the third prosecution witness establishes that two men entered into the Pacific Energy Service station at Walu Bay at around 3am on 07th October 2015 and one of them took money from the cash register. According to the said witness, the duo then got into a car and left the scene.

12. The second accused had made admissions to the effect that there was a discussion inside the car for them to 'look for a service station to rob it'; that he drove to the Pacific Energy Service station at Walu Bay; that the other three got out of the car while he remained inside the car; that two of them went inside the service station; and that he drove off when the three came back and got into the car.

01st ground of appeal

[19] The entire submission under this ground of appeal is based on challenging the evidence the prosecution led in the form of his cautioned interview. Though the appellant was absent during the trial while on bail, his counsel had vigorously defended him both during the *voir dire* and the trial proper. In addition to his confessional statement, there had been two independent items of evidence in the form of the laptop and the key of the getaway car stolen from the victim of the robbery being recovered from the appellant thus implicating him in the first count. The conviction of the appellant on the second and third counts had been entirely based on his cautioned interview.

[20] The trial judge had been fully conscious of the importance of the cautioned interview regarding the criminal liability of the appellant and he had addressed the assessors on the evidence regarding the cautioned interview placed by the prosecution and the cross-examination done on behalf of the appellant by his counsel in paragraphs 49-61 of the summing-up. He had directed the assessors as follows as to how they should approach the cautioned interview evidence.

> *65. The prosecution tendered the document PE 11 as the cautioned interview statement of the second accused. The prosecution says that the answers recorded in PE 11 were given by the second accused voluntarily. The second accused challenges the voluntariness of the said cautioned interview statement saying that it was obtained by oppression. The second accused says that he was assaulted by the police on 09th October 2015 and he was assaulted with a police baton. The second accused also says that he was threatened and verbally abused by the police.*
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> *66. This is how you should deal with the cautioned interview statement tendered as PE 11.*
>
> *a. You should first decide whether the second accused made the statements recorded in PE 11? If you are not sure that he made it, the matter ends there. You should disregard the cautioned interview statement tendered as PE 11.*

b. If you are sure that the second accused made it, then you should consider whether the statement was made voluntarily. You have to be sure that the statement was not obtained by oppression and it was not obtained in an unfair manner. If you are not sure that the statement was made voluntarily, then you should disregard it.

c. If you are satisfied that the statement was made voluntarily, then you should decide whether you are sure that the statement is true. This means that you should consider PE 11 as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it is true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.

[21] The above directions are substantially in conformity with the decision in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) by the Court of Appeal which analyzed previous decisions including **Mava v State** [2015] FJSC 30; CAV 009. 2015 (23 October 2015) and highlighted as to what directions should be given to the assessors on how to evaluate a confession.

*'[26].....The correct law and appropriate direction on how the assessors should evaluate a **confession** could be summarised as follows.*

*(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

*(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the **confession** (vide **Volau**).*

*(iii) Once a **confession** is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the **confession** including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[22] The learned trial judge had given his mind in agreeing with the assessors to the cautioned interview of the appellant in his judgment too.

'5. The admissibility of the cautioned interview was challenged on the basis of oppression. Considering the evidence of the police officers who dealt with the second accused from the time of arrest until the accused was formally charged, I am satisfied beyond reasonable doubt that the cautioned interview tendered in evidence as PE 11 was not obtained by oppression. I have considered the medical report of the second accused tendered with consent as 2DE1 that had been issued based on the examination conducted about two weeks after the second accused was produced in court. Though 2DE1 indicates that certain injuries were observed on the upper back region, the evidence presented by the prosecution suggests a possible explanation to the said injuries. Therefore, I hold that PE 11 is admissible.'

[22] In the circumstances, the appellant has no reasonable prospect of success in appeal on the first ground of appeal.

02nd ground of appeal

[23] The appellant seems to challenge the trial in absentia against him. The trial judge had in the *voir dire* ruling dated 08 February 2017 given reasons for allowing the application by the prosecution to proceed with the trial in the absence of the appellant as follows.

'2. The trial dates in this case were fixed on 26th May 2016 when both accused were present in court. The second accused did not appear since

30th January 2017. On 07th February 2017, the prosecution made an application to proceed with this trial in the absence of the second accused. The second accused knew that the trial against him in this case was scheduled from 07th February 2017 to 21st February 2017. His absence was a clear indication that he had chosen not to be present for his trial. Therefore, I decided to proceed with the trial against the second accused in absentia.'

[24] The Constitution of the Republic of Fiji 2013 under Article 14(2) (h) specifically provides for trial in absentia which states:

> *'Every person has a right*
>
> *(h) to be present when being tried, unless-*
>
> *(i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or*
>
> *(ii) the conduct of the person is such that the continuation of the proceedings in his or her presence is impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence;*

[25] In fact the trial judge had warned the assessors in paragraph 15 and 70 of the summing-up on the trail in absentia as follows

> *'15. This trial is held in the absence of the second accused. According to the Constitution, every accused has the right to be present during his/her trial. However, a trial can be held in the absence of an accused if it appears to the court that the accused had chosen not to attend the trial. Even when an accused chooses not to attend the trial, still the burden remains on the prosecution to prove the case against the accused beyond reasonable doubt and the accused is presumed innocent until proven guilty. Therefore, please remember that you should not draw any inference due to the fact that this trial is conducted in the absence of the second accused.'*
>
> *'70. May I again remind you that even though an accused person is absent during this trial, the burden of proving the case beyond reasonable doubt remains on the prosecution. You should not draw any inference based on the absence of the accused.'*

[26] Despite the appellant's self-imposed absence from court his counsel had diligently looked after his interest throughout the trail.

[27] Therefore, this ground of appeal has no reasonable prospect of success.

03rd ground of appeal

[28] The appellant is complaining that the trial judge had not independently assessed the evidence before affirming the opinion of the assessors. This ground of appeal is misconceived.

[29] When a trial judge agrees with the assessors or when he affirms the majority opinion of the assessors, the scope of the trial judge's function is governed by the decision of the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) where it was held

> *'[4] .....Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under* ***section 237(3) of the Criminal Procedure Act*** *2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See:* ***Mohammed –v- The State*** *[2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[30] Earlier, in **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having examined several decisions remarked

> *'[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.'*

[31] I have said in a number of previous rulings as to what a 'judgment' consists of under section 237 of the Criminal Procedure Act, 2009.

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court.* ***A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision*** *(which alone is rather unhelpfully referred to as the judgment in common use).*

[see **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020), **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22

June 2020), **Tikoigiladi v State** [2020] FJCA 86; AAU138.2016 (23 June 2020), **Kumar v State** AAU185 of 2016 (22 July 2020), **Raitekiteki v State** AAU 011 of 2017 (29 July 2010), **Qio v State** [2020] FJCA 119; AAU057.2016 (31 July 2020), **Vasu v State** AAU0118 of 2016 (11 August 2020)], **Fabiano v State** [2020] FJCA 133; AAU077.2017 (14 August 2020)] and **Damu v State** AAU 0091 of 2018 (26 August 2020)]

[32] The responsibility of the trial judge becomes different and more onerous when the trial judge disagrees or overturns the majority opinion of the assessors [see **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)].

[33] In any event when one examines the judgment of the trial judge it is clear that he has given his mind to crucial pieces of evidence against the appellant and the credibility of such evidence in agreeing with the assessors and convicting the appellant.

[34] Therefore, this ground of appeal not only has no reasonable prospect of success but is frivolous and vexatious.

[35] Since none of the grounds of appeal reaches the threshold of 'reasonable prospect of success' they obviously fail to reach the standard of 'very high likelihood of success' required for a favorable decision for bail pending appeal.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL