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

CRIMINAL APPEAL NO.AAU 049 of 2019
[In the High Court at Lautoka Case No. HAC 137 of 2015]

BETWEEN : **DAYA PRASAD**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. G. O'Driscoll for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **23 September 2020**

Date of Ruling : **24 September 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on two counts of indecent assault contrary to Section 212 (1) of the Crimes Act, 2009 and three counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division from 01 August 2014 to 20 November 2014.

[2] The information read as follows.

*'**First Count***

Statement of Offence

Indecent assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 1st day of August, 2014 and the 31st day of August, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

Second Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 27th day of September, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Third Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 10th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fourth Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 18th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fifth Count

Statement of Offence

Indecent assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 20th day of November, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

[3] The brief facts, as could be gathered from the sentencing order are as follows.

'Count 1 – Indecent assault

In August 2014 during the second term school holidays the victim was learning to drive from you. When she was learning to drive you started touching her thighs over her cloths while driving. You squeezed her breasts. The victim didn't like it, but you told her not to tell anyone about it. The victim reported the incident to her mother. But her mother did not believe her saying that you were part of the family.

Count 2 – Rape

On 27 September 2014 the victim was told by her mother to deliver some food to your place. The victim didn't want to go, but her mother forced her to go. When the victim brought the food, you asked her to come inside the house. You locked the grill door and forced her to your room. You forcefully took off her clothes. You pushed her on the bed and got on top of her. You tried to kiss her, but the victim started moving her head. The victim kept on shouting, but no one could hear her as there was loud music played at your house. You separated her legs with your legs while holding her hands tightly. You inserted your penis into her vagina. The victim didn't like it. She called for help by shouting, but no one could hear her. She was shocked, and she didn't know for how long you did it. The victim said that she did not expect that from her uncle.

Count 3 – Rape

On 10 October 2014 the victim went to your place with her mother to make some sweets. Her mother had to go back home leaving the victim at your place as her mother needed something. You then locked the grill and grabbed her to the sitting room. You played a sex movie and told her to watch it. You held her tight and forced her to watch the movie. You then grabbed her to your room. You took off her clothes and your clothes. You then placed your mouth on her vagina. You were holding her hands and she shouted for help. No one could hear her as the music was loud. You then inserted your penis into her vagina. The victim didn't like it. It was painful for her. She tried to push you and she bit your arm. You threatened her not to tell the incident to anyone.

Count 4 – Rape

On 18 October 2014 the victim was asked by her parents to go with you to Sigatoka to deliver some sweets. When you were returning in the night you stopped the vehicle on the way. You took a torch and checked around. You asked her to come to the back of the van. When the victim refused you grabbed her. You tried to kiss her, and she kept on moving her head. She didn't like it. You took off her clothes. You inserted your penis into her vagina. She tried to push you, but you over powered her. You held her tight. The victim tried to shout but there was no one around.

Count 5 – Indecent assault

On 20 November 2014 the victim was told by her mother to go with you and exchange a packet of milk. On your way back, you parked your vehicle for the victim's sister to come and pick her up. While waiting in the vehicle you came and started touching her. You touched her thighs and breasts. You held her hands when she tried to stop you. The victim didn't like it and you continued to touch her thighs and breasts until her sister came.'

[4] At the conclusion of the summing-up on 28 March 2019 the assessors had unanimously opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on 08 April 2019, convicted the appellant and sentenced him on 18 April 2019 to 13 years, 11 months and 02 weeks of imprisonment with a non-parole period of 09 years, 11 months and 02 weeks.

[5] The appellant's timely application for leave to appeal against conviction and sentence had been signed in person on 14 May 2019 (received by the CA registry on 22 May 2019). On 15 May 2019 Iqbal Khan & Associates also had filed a notice of appeal and an application for leave to appeal against conviction and sentence on behalf of the appellant. The appellant's application for bail pending appeal had been filed on 24 January 2020 and written submissions for leave to appeal and bail pending appeal had been tendered on 29 May 2020. The state had responded by its written submissions filed on 16 June 2020. At the leave to appeal hearing both counsel relied on their written submissions.

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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.

[7] 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:

> *"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:*
>
> *(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."*

[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."*

[8] 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)

[9] 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.'*

[10] 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).'

[11] 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'*

[12] 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...."

[13] 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 ... ."*

[14] ***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."*

[15] Therefore, the legal position appears to be 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. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[16] 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.

[17] 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'.

[18] Grounds of appeal urged on behalf of the appellant are as follows.

> ***Against conviction***
>
> *1)* ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately directing/ misdirecting 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.*
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> *2)* ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately directing the Assessors the significance of Prosecution witness conflicting evidence during the trial.*
>
> *3)* ***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.*
>
> *4)* ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*
>
> *5)* ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing/putting the defence case to the Assessors.*
>
> *6)* ***THAT*** *the trial Judge erred in law and in fact in not dealing adequately and/or properly and/or sufficiently on circumstantial evidence and not identifying what evidence was or could be classified as circumstantial evidence.*

*7) **THAT** the Learned Trial Judge erred in law and in fact in misdirecting and/or not properly and/or sufficiently himself and the assessors on the standard and burden of proof.*

*8) **THAT** the Learned Trial Judge erred in law and in fact in misdirecting and/or not properly and/or sufficiently himself and the assessors specifically on the prosecution evidence.*

*9) **THAT** the Appellant appeals against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*

Against sentence

*10) **THAT** the Learned Trial Judge erred in law and in fact in not taking into relevant consideration SENTENCING AND PENALTIES DECREE 2009 namely:*

1. *Section 3 of the Sentencing and Penalties Decree;*
2. *Section 4 of the Sentencing and Penalties Decree; and*
3. *Section 5 of the Sentencing and Penalties Decree.*

*11) **THAT** the Appellant reserve his right to argue and/or file further grounds of appeal upon receipt of the Court records in this matter.*

[19] It is clear that the appellant's grounds of appeal have been framed in very general terms and all of them allege shortcomings in the summing-up. The written submissions also render very little help in that regard as they lack elaboration and sufficient details in that the instances which constitute the alleged deficiencies raised in the grounds of appeal from the summing-up have not been pointed out. The appellate court cannot and should not be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant's grounds of appeal or the factual or legal foundations thereof. As stated in **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006) it would not be an unfair description to suggest that the counsel has used a 'scatter gun' approach in drafting the grounds of appeal and not substantiated them with sufficient details at least in the written submissions.

[20] Lord Parker CJ in ***Practice Note (Crime: Applications for Leave to Appeal)*** [1970] 1 WLR 663 reminded counsel that *'it is useless to appeal without grounds and that the*

grounds should be substantiated and particularized and not a mere formula'. Though what degree of particularity is required may not be capable of precise definition, they should be detailed enough to enable court to identify clearly the matters relied upon.

[21] It is the duty of the counsel in drafting and arguing grounds of appeal to act responsibly and not to make sweeping and unjustified attacks on the summing-up of the trial judge unless such attacks can be justified [vide **Morson** (1976) Cr App R 236]. Thus, counsel should not settle or sign grounds of appeal unless they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court [vide paragraph 2.4 of the '**A Guide to Proceedings in the Court of Appeal Criminal Division** ('the Guide') published in the UK in 77 Cr App R 138].

[22] Du Parcq J in **Fielding** (1938) 26 Cr App R 211 said that

> *'It is most unsatisfactory that grounds of appeal should be drawn with such vagueness ..... Ground 4 is in the following terms: "That the judge failed adequately to direct the jury as to the law and evidence to be considered by them".'*
>
> *'It is not only placing an unnecessary burden on the court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet.'*

[23] In **Singh** [1973] Crim. LR 36 the Court of Appeal drew attention to the danger of extracting sentences from the summing-up out of context when, if they had been quoted in context, they would have been unobjectionable. **Nico** [1972] Crim. LR 420 similarly states that the terms of any misdirection relied upon must be set out in the grounds.

[24] While the grounds of appeal should be reasonable full, counsel should not go to the opposite extreme and overloading them [vide **Pybus** (1983) The Times, 23 February 1983]. In **James; Selby** [2016] EWCA Crim 1639; [2017] Crim.L.R.228 the court warned that if grounds of appeal are inexcusably prolix and not consolidated, an application for leave to appeal might be refused on the basis that no ground was identifiable.

[25] In **Rauqe v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) the Court of Appeal remarked as follows [see also **Kishore v State** [2020] FJCA 70; AAU121.2017 (5 June 2020), **Vunisea v Fiji Independent Commission Against Corruption** - Ruling [2020] FJCA 169; AAU83.2018 (16 September 2020) and **Vunisea v Fiji Independent Commission Against Corruption** [2020] FJCA 169; AAU98.2018 (16 September 2020)] on framing of appeal grounds.

> *'[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said*
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> *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

[26] Similar observations were earlier made in the case of **Rokodreu v State** [2016] FJCA 102; AAU0139.2014 (5 August 2016) by Goundar J. as follows.

> *'[4] I have read the appellant's written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*
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> *[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing better particulars of the alleged complaints in the*

summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.'

[27] As submitted by the state at the time ***Rokodreu*** was decided, the threshold for leave to appeal was 'arguable ground of appeal' whereas now it is 'reasonable prospect of success' for a timely appeal and for enlargement of time the threshold is 'real prospect of appeal' for an appeal filed out of time. Therefore, it is now more important than ever before for an appellant to submit exact evidence or instances of alleged shortcomings or deficiencies in the material available with the appellant at the leave to appeal stage (or extension of time or bail pending appeal) such as bail pending trial ruling, *voir dire* ruling, other interlocutory rulings made during the trial, summing-up, the judgment and the sentence order, as the case may be. These documents are usually made available to the accused or their counsel at the trial stage.

[28] The state has specifically submitted that due to lack of particulars in the written submissions filed on behalf of the appellant it has not been able to make any relevant submissions on the grounds of appeal. Thus, as a result this court has been deprived of any assistance from the respondent in coming to any determination on the questions of leave to appeal and bail pending appeal. This court cannot and would obviously not make a ruling on both issues without properly hearing the respondents on matters relating to the grounds of appeal.

[29] Therefore, I am unable to consider any of the grounds of appeal at this stage and also cannot determine whether any one or more or all of them could reach the threshold of 'reasonable prospect of success' and therefore, have no other option but to refuse leave to appeal. As for the bail pending appeal application, I cannot decide whether any one or more or all of the grounds of appeal have a 'very high likelihood of success'. Nor do I find any other exceptional circumstances warranting bail pending appeal.

[30] I should for the record mention that in future a notice of appeal or an application for leave to appeal (or an application for extension of time or bail pending appeal application) containing grounds of appeal which do not substantially meet the above requirements or are filed in in negligent or careless disregard of them may also run the

risk of the single judge of the Court dismissing the appeal on the basis that it is vexatious or frivolous under section 35(2) of the Court of Appeal Act.

Order

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL