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

CRIMINAL APPEAL NO.AAU 0060 of 2017
[In the High Court at Lautoka Case No. HAC 06 of 2014]

BETWEEN:

ERONI CEVAMACA
Appellant

AND:

STATE
Respondent

Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. M. Fesaitu with Ms. N. Sharma for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	**:**	**11 September 2020**
Date of Ruling	**:**	**22 September 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on a single count of rape committed at Lautoka in the Western Division on 11 January 2014 contrary to section 207(1) and (2) (a) of the Crimes Act, 2009.

[2] The information read as follows.

Statement of Offence

***RAPE**: Contrary to Section 207 (1) of (2) (a) of the Crimes Decree, 2009.*

Particulars of Offence

***ERONI CEVAMACA**, on the 11th day of January 2014, at Lautoka in the Western Division, inserted his penis into the vagina of LITIA LEWAIRAVU, without her consent.*

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

5. In the early hours of the morning of 11th January, 2014 the complainant and her friends met the accused and his friends outside the Zone Nightclub. According to both the prosecution witnesses it was for them to go and have drinks at the house of the accused. In a 7-seater van all went to the house where the accused was renting. The accused went into his bedroom whilst the complainant, her friend Jone and a friend of the accused were in the sitting room waiting for drinks but none were brought. After a while Jone stood up and went outside, the complainant went to the washroom and upon her return from the washroom she met the accused standing on the doorway of his bedroom. The complainant told the court that the accused asked her to have sexual intercourse with him but she refused.

6. The accused pulled her hand and at the same time Jone came and pulled her other hand. The complainant started screaming, while Jone was pulling her hand the accused punched Jone's hand and as a result Jone's watch fell after which Jone ran outside. Thereafter the complainant was pulled inside the bedroom and pushed on the bed the complainant screamed but the accused covered her mouth and at this time punched her right thigh three times.

7. On the bed the complainant was struggling with the accused and in her words the accused was all over her. The accused was forcing himself on her and at the same time swearing. The complainant was wearing leggings and a top the accused only removed one side of her leggings and then inserted his penis into her vagina and had sexual intercourse with her without her consent.

8. Jone Namakadre who was in the house of the accused at the time informed the court that the accused came quietly from his bedroom and pulled the complainant's leg. The complainant grabbed Jone and started screaming. According to Jone the complainant was trying to defend herself by getting hold of the door frame. The accused pulled the complainant inside the bedroom, closed the door and locked it. Jone tried opening the door but was not successful so he went to the elderly man sleeping in the house so that he could help Jone get the complainant out of the room. The elderly man did not

assist so Jone again went and pulled the handle of the door when he heard the complainant continue screaming inside the bedroom.

9. The accused on the other hand denied raping the complainant he told the court that outside the Zone Nightclub he recognized the complainant by face as his neighbour living a few blocks away from his house. During his conversation with the complainant he invited her to his house to have sex with him and that the complainant agreed. At his house the accused asked the complainant to go to the bedroom. The complainant stood up and he escorted her to the bedroom.

10. In the bedroom both took off their clothes waist downwards and they had sexual intercourse. The accused did not see any resistance or reluctance on the part of the complainant and that she had consented to having sex with him, he did not drag her into the bedroom or use any violence on her.

11. During the trial both the prosecution witnesses were referred to their police statements given to the Police on the day of the alleged incident with the evidence they gave in court. Both the witnesses agreed that there was a difference between the version they had told the Police when everything was fresh in their mind and the version they had told the court.

[4] At the conclusion of the summing-up on 13 December 2016 the assessors unanimously had opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on 15 December 2016, convicted the appellant and sentenced him on 29 December 2016 to 08 years and 11 months of imprisonment with a non-parole period of 07 years.

[5] The appellant's timely application for leave to appeal against conviction and sentence had been filed by Samusamuvodre Sharma Law on 27 January 2017 and the CA registry had assigned the number AAU 005 of 2017. Another notice of appeal against conviction and sentence by the same law firm had been tendered on 03 May 2017 which the CA registry had registered under AAU 060 of 2017 on the premise that AAU 005 of 2017 had been deemed abandoned purportedly under Rule 44 (13) of the Court of Appeal Rules due to non-compliance with Rule 43 as the appellant's lawyers had not filed an affidavit of service. Thereafter, the Legal Aid Commission had tendered an application for enlargement of time with amended grounds of appeal and an affidavit from the appellant only against conviction and written submissions on 02 April 2020 followed up by an application for bail pending appeal and written

submissions on 11 June 2020. The state had tendered its written submissions on 10 September 2020.

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] Under the third and fourth factors in ***Kumar*****,** test for enlargement of time now is **'real prospect of success'.** I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

Law on bail pending appeal.

[10] 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.*
>
> *[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.*
>
> *[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."*

[11] 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)

[12] 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.'*

[13] 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).'*

[14] 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'*

[15] 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...."*

[16] 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 ... ."*

[17] ***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."*

[18] 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.

[19] 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.

[20] 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'.

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

Appeal against Conviction

Ground 1 *THE Learned trial Judge did not provide cogent reasons when overturning the unanimous opinions of the assessors that the Appellant is not guilty for the charge.*

Ground 2 *THE Learned trial Judge erred in law and in fact by not directing himself and the assessors on how to approach and assess the omissions arising from the prosecution witnesses evidences on oath with their police statements.*

Ground 3 *THE Learned trial Judge erred in law and in fact by misdirecting himself to conclude that the evidence of the inconsistencies of the prosecution witnesses is due to;*

i) The passage of time can affect ones accuracy of memory;
ii) The inconsistencies are not significant which affects the reliability and credibility of the complainant and other prosecution witness.

Ground 4 *THE Learned trial Judge in his judgment erred in law and in fact by misdirecting himself to reasonably base his conclusion that the blood seen by the doctor on his examination gloves is the result of force used whereas his Lordship had not considered that;*

(i) It is the doctor's evidence that he is unable to conclusively state that rape had occurred per his finding;
(ii) It is the doctors evidence that the blood on the examination gloves is either from penetrative injuries or the patient having her menses;
(iii) It is not disputed issue in trial on the element of penetration;
(iv) There is no evidence adduced from the complainant that she received injuries as a result of the sexual intercourse.

[22] The appellant relies on **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) where the Supreme Court examined the trial judge's duty in disagreeing with the assessors and stated as follows.

*'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have **"cogent reasons"** for differing from their opinion. The reasons must be founded on the **weight of the evidence** and must reflect the judge's views as to **the credibility of witnesses**: **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*

'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her

conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.

[23] The Supreme Court in the subsequent decisions in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) has further elaborated the duty of the trial judge when disagreeing with the majority of assessors.

[24] In ***Ram***, the appellant had been charged with murder under section 199 of the Penal Code and tried before three assessors who had unanimously found him guilty as charged, and the trial judge, agreeing with the assessors, had convicted him and sentenced him to life imprisonment. The conviction and sentence was affirmed by the Court of Appeal, but on appeal to the Supreme Court the conviction was set aside on the basis that the Court of Appeal had failed to make an independent assessment of the evidence before affirming the verdict of the High Court which was found to be unsafe, unsatisfactory and unsupported by the evidence, giving rise to a miscarriage of justice. Justice Marsoof said

> *'80. A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirely of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.'*

[25] 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.'*

[26] The Court of Appeal in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) referring to ***Ram*** and ***Mohammed*** said of the trial judge's duty under section 237 of the Criminal Procedure Act, 2009 as follows:

> *'[13] While we accept that in **Ram** the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that it is unreasonable or cannot be supported having regard to the evidence (see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that **where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment**. But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" **(State v Miller (unreported CAV 8 of 2009; 15 April 2011, Mohammed v State (unreported CAV 2 of 2013; 27 February 2014)**.*

[27] In ***Chandra***, Justice Marsoof clarified what His Lordship meant in paragraphs [79] and [80] in ***Ram*** as follows. In ***Chandra*** the trial Judge had agreed with the assessors and convicted the appellant for murder.

> *'[24] In arriving at its decision, this Court examined in paragraphs [79] and [80] of its judgment the difference between the jury system and the system of trial with assessors that prevails in Fiji, and concluded that in terms of section 299(2) of the Criminal Procedure Code, Cap 21, which was in force at the time of the High Court trial in 2008, as well as under section 237 of the Criminal Procedure Decree, which is currently in force, the trial judge was required to make an independent assessment of the evidence to be satisfied that the verdict of court is supported by the evidence and is not perverse. This Court also noted that if the trial judge disagrees with the unanimous or majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court". This Court was here simply setting out the requirements of the statutory law currently in force. In Praveen Ram, this Court did not, and did not have to in the circumstances of that case,*

express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors.

'[25] The confusion that surfaces in paragraphs [23] and [24] of the impugned judgment of the Court of Appeal arises from a failure to distinguish between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors. In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. ***Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors****. However, as was observed by this Court in paragraph [32] of its judgement in Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014),"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."*

[28] However, Justice Keith said in ***Chandra***

'*[35] The majority of the assessors expressed the opinion that* ***Chandra*** *was guilty of murder. The trial judge agreed with the majority, but in his judgment he did not say why. The form of his judgment is heavily criticised by* ***Chandra*** *'s legal team. They rely on Praveen Ram v The* ***State*** *[2012] FJSC 12 in which Marsoof JA said at [80]:*

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the [entirety] of the evidence led at the trial ... In independently assessing the evidence in the case, it is necessary for a trial judge ... to be satisfied that the ultimate verdict is supported by the evidence and is not perverse ..."*

[36] I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in ***Sheik Mohammed v The State*** *[2013] FJSC 2 at [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."*

[37] But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[29] When the trial judge affirms the opinion of the assessors his function was described by the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) in the following manner.

'[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] In ***Singh*** the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations of were made by Hon. Justice Saleem Marsoof.

'[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. ……..In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, ***it is evident on the available evidence that the trial judge had***

failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors *that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.'*

[31] The appellant also relies on the more recent case of **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) where the Court of Appeal *inter alia* stated

> '*43. ……..... the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.*
>
> *'[44] The question is has he correctly followed the guidance given in the cases referred to in the paragraph above……'*

[32] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.

[33] However, what could be identified as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.

[34] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[35] In my view, in both situations, 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) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[36] This stance is consistent with the position of the trial judge at a trial with assessors in Fiji *i.e.* the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

01st, 02nd 03rd and 04th grounds of appeal

[37] The appellant's contention under the first ground of appeal is that the trial judge had not given cogent reasons for overturning the opinion of the assessors. Upon an examination of the summing-up, I find it to be a comprehensive address to the assessors not only on the prosecution evidence but also on the appellant's evidence and an analysis of both versions. The trial judge had given directions on all relevant aspects of law and facts. He had left it to the assessors to assess and evaluate the evidence. The summing-up is clearly a part and parcel of the judgment.

[38] However, the complaint of the appellant is that the trial judge had not followed the guidelines given in several judgments cited above as to his burden when disagreeing with the assessors. Such compliance becomes even more important when the trial

judge had given what could be considered a complete summing-up on all aspects of law and facts to the assessors and when they had returned with an opinion of not guilty.

[39] The case for the prosecution had been based on the evidence of the complainant and Jone Namakadre. The only issue at the trial was that of consent. The trial judge had summarized the evidence of the complainant in paragraphs 30-62 of the summing-up in which several inconsistencies, contradictions and omissions had been brought to the surface by the defense as highlighted in the summing-up. They pervade the evidence of the complainant regarding her version on the chain of events preceding the alleged rape, matters associated with the act of rape itself and post-rape events.

[40] It is not required and cumbersome to itemize each and every such inconsistency, contradiction and omission at this leave to appeal stage but I would quote some paragraphs from the summing-up where the judge had referred to them.

> *'44. The complainant further agreed that the chain of events she had described to the Police was different from the one she told the court. She stated that whatever she told the court was the truth. In regards to the above complainant admitted that she had lied to the Police.*
>
> *'46. The complainant agreed that the chain of events immediately before being pulled into the bedroom by the accused is different from what she had told the court. The complainant upon questioning as to which version was the true version whether she was going to the washroom or she was lying down beside Jone she answered "On my way back from the washroom'.*
>
> *'48. However, the complainant was unable to point out where it was stated in her police statement that the accused had approached her to have sexual intercourse with him and she had refused.'*
>
> *'49. The complainant admitted that the accused had not approached her to have sexual intercourse with him. The complainant further stated that the evidence that she had given under oath in examination in chief was not correct when she said the accused had asked her to have sexual intercourse with him before been dragged into the bedroom.'*
>
> *'52. The complainant agreed that everything was fresh in her mind when she gave her police statement and she also agreed that the version she gave the Police was different from the version she had told the court. However, the complainant stated that the evidence she gave in court was the truth. The complainant further maintained that she had started screaming from the time*

the accused started pulling her hand at the doorway of his bedroom and not when the accused was punching her thighs as per her police statement.'

'54. The complainant agreed that on the day of the incident she was also wearing her panty but she had not mentioned about her panty in her evidence in court and that her police statement was correct.'

55. In respect of her clothing it was put to the complainant that the manner in which she had described the removal of her leggings by the accused which is that only one side of the legging was removed she could not have come back into the room looking for her clothing. The complainant agreed that there was an inconsistency between what she had told the court and what she had told the Police, however she maintained that she had told the correct version to the court. She further agreed that one of her leggings was not completely removed, however, she did not agree that no clothes were left behind in the bedroom for her to go back to.'

57. The complainant did not agree that being couple of houses away from the accused's house she had seen him, however, she agreed that the accused comes to her house to drink grog and that she knew him by face.'

58. The complainant agreed that in her evidence she mentioned that she did not know the accused at all.'

[41] Regarding the evidence of Jone the following paragraphs are found in the summing-up where the trial judge had referred to different versions of his narrative in the police statement and the testimony in court.

'79. Jone agreed that the version of events stated in his police statement of how the complainant came into the house and how she went out was different from the version he had told the court, however, he maintained that whatever he told the court was the truth.

80. Jone agreed that he had given two different stories, one version to the Police and one version to the court but he maintained that the version he told the court was the truth.

84. one also agreed that in his police statement he did not inform the Police about the complainant holding onto the frame of the door. Jone further stated that he also had not informed the Police about the accused punching the complainant on her thigh. Jone was referred to his police statement dated 11th January,2014 line 32 and line 33 as follows:

> *"She then stated that, that guy forcefully punched both her thighs and forcefully had sex with her."*

Jone agreed that he did not see the accused punching the complainant on the thigh.

85. Jone agreed that when he left the accused house after been chased by him he met the complainant's boyfriend. He was not sure whether he had told the boyfriend that the complainant had been raped but told him that one guy had locked the complainant in the room.

90. To a question asked by the court Jone in reply to question by defence counsel informed the court that he had not mentioned in his police statement when everything was fresh in his mind that the accused had told the elderly man to have his turn in the bedroom. The witness was referred to his police statement of 11th January, 2014 line 45 to 48 back of page 1:

> *"After about 5 to 7 minutes the man came outside and woke the old man who was sleeping in the sitting room and told him to go inside the bedroom in which he just come out of."*

91. Jone agreed that after two years in court he was telling a different story but maintained he told the correct version in court.'

[42] The person referred to as the elderly man or the complainant's boyfriend Ashneel Kumar who could have shed light on what transpired in that night was not called by either side to give evidence. There appear to be some inconsistencies, contradictions and omissions between the testimony of the complainant and Jone as well. There are other aspects of the evidence of both the complainant and Jone which I think needed close scrutiny by the trial judge.

[43] The appellant's evidence had been summarized in paragraphs 99-112 and doctor Nabaro's evidence in paragraphs 113-121 of the summing-up. The appellant had taken up the position that he had invited the complainant to his house with the intention to have sexual intercourse and she had agreed and once inside the house the complainant had come into his bedroom when requested by the appellant to have sex with him and both had then engaged in consensual sexual intercourse. The doctor had not found physical evidence of sexual intercourse when examining the complainant who was calm at the examination on the day of the alleged incident. Nor had he observed any bruising or swelling on the complainant's thighs despite three hard punches allegedly delivered by the appellant causing unbearable and intense pain.

[44] The trial judge had given very compressive directions as follows on how the assessors should evaluate and decide on the reliability and credibility of evidence before them *vis-à-vis* the guilt or otherwise of the appellant.

> *162. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.*
>
> *163. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.*
>
> *164. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.*
>
> *165. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
>
> *166. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence and do not believe a single word accused told in court still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.'*

[45] The learned trial judge had once again summarized the evidence of the prosecution and defense in the judgment and explained the inconsistencies, contradictions and omissions in the versions of the complainant and Jone on the premise that 02 years had passed since the incident happened and the time gap could have affected their memory. However, confronted with their police statements both witnesses had

insisted that what they were telling in court was the truth. Had it been simply a case of lapse in memory I would have expected them to correct themselves on the basis that they had forgotten certain aspects when reminded of their prompt versions given to the police on the same day as the incident happened. In some instances the complainant had admitted having lied to the police but not explained why she gave a false version to the police. In fact she had once admitted that what she had told in examination-in-chief was wrong. One would not expect the witnesses to be human tape recorders but the fundamental substratum of their story should be consistent unless reasonably explained.

[46] The trial judge had found those inconsistencies, contradictions and omissions to be insignificant without explaining why he had come to that conclusion, as they could have a direct or indirect bearing on the crucial issue of consent. Similarly, it is not possible to ascertain the basis for trial judge's assertion in the judgment that the complainant was able to withstand cross-examination in the teeth of serval inconsistencies, contradictions and omissions highlighted in cross-examination where in one instance she had admitted giving wrong evidence in examination-in-chief. Thus, the basis to treat the complainant's evidence as truthful and reliable by the trial judge is not made clear in the judgment.

[47] The trial judge had not found the appellant to be telling the truth. Once again the learned judge had not given any reasons as to why he had come to that conclusion but he had posed the question whether the appellant would have invited all the group members including the complainant to come to his house if he was going to have sexual intercourse with her. Yet, the evidence had revealed that two of the group members (a male and a female) had already gone to one bedroom after their arrival indicating that the group members had gladly accepted the appellant's invitation to go to his house. On the other hand, one might also argue that the appellant would not have invited the whole group home if he was going to have forcible sexual intercourse with the complainant and done so in the face of alleged resistance witnessed by Jone providing perfect evidence against the appellant.

[48] I also do not find from the summing-up or the judgment that the prosecution had managed to demonstrate any inconsistencies, contradictions and omissions in the appellant's version of events.

[49] The trial judge had mentioned that the complainant had promptly reported the matter to the police and lack of motive for false implication as reasons to believe the prosecution evidence. One question that arises from the prompt complaint is that despite the promptness why there were so many inconsistencies, contradictions and omissions in the evidence of the complainant and Jone. In my view, according to the summing-up and the judgment both prosecution witnesses do not appear to have offered reasonable explanations for those inconsistencies, contradictions and omissions. As for the motive the trial judge himself had, however, stated as follows in the summing-up as reasons for the false allegation of rape suggested by the appellant to the prosecution witnesses.

> *'60. The complainant disagreed that to save her image and her relationship with her boyfriend she lied that the accused had raped her.....She also denied that the story of rape was made up by the complainant and her friends to make her look good in the "eyes" of her boyfriend.'*
>
> *97. Jone also disagreed that in order to take revenge from the accused for chasing him out of his house and swearing at him and in order to save the relationship of the complainant with her boyfriend the witness, complainant and their employer had concocted a story against the accused.'*

[50] Further, the trial judge had treated the doctor's evidence that he saw a bit of blood on his examination gloves as evidence of forcible sexual penetration. However, I do not think that in the light of the totality of the doctor's inconclusive evidence this inference could be justified. The relevant paragraphs are as follows.

> *'119. In respect of blood seen in the vaginal area the Doctor stated that it could have been through penetrative injuries or patient could be menstruating at the time. The Doctor maintained that according to his report no laceration or tears were noted on the patient but the Doctor did not rule out the possibility that sometimes lacerations could not be detected.*
>
> *'121. In a follow up to a question asked by the court, in answer to the State counsel the Doctor stated that even if forceful penetration takes place not in all cases such penetration will cause a tear or laceration.'*

[51] Therefore, I am of the view that though I cannot definitely say that the appellant will have a reasonable prospect of success (I have considered this to be timely appeal as explained below) without the complete appeal record, I consider the issues as to whether the trial judge's judgment had properly focused on the weight of the evidence and reflected correctly as to the credibility of witnesses and whether the reasons given to disagree with the assessors are capable of withstanding critical examination in the light of the whole of the evidence presented at the trial, to be questions of mixed law and facts which should be considered by the full court according to the principles set out in section 23 (1) of the Court of Appeal Act.

[52] Therefore, I grant leave to appeal against conviction on all grounds of appeal.

[53] I have considered all four grounds together, for the 02nd to 04th grounds of appeal are interconnected and deal with separate aspects of the broad complaint under the first ground of appeal. The appellant is free to argue them collectively or separately at the hearing before the full court and the full court may similarly decide whether to consider them under the first ground of appeal or as separate grounds of appeal.

[54] I do not consider that there has been a delay in the appellant's appeal as there does not appear to be any absolute obligation cast by Rule 43(1)(b) of the Court of Appeal Rules to file an affidavit and therefore, the appeal need not have been considered abandoned in terms of Rule 44(13). What it prescribes is a duty to *'file a copy endorsed with a certificate of the date the notice was served'* though an affidavit would not certainly be obnoxious to Rule 43(1)(b) and may be preferable as it carries more weight and high degree of responsibility. However, the absence of an affidavit therefore, could not have made the original notice of appeal deemed abandoned.

[55] As for bail pending appeal, I am not convinced by the limited material available to me that the appellant has a 'very high likelihood of success' in the appeal. Nor has he demonstrated any other exceptional circumstance and therefore, bail pending appeal is refused.

Order

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL