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

**CRIMINAL APPEAL NO.AAU 073 of 2019**
**[High Court Criminal Case No. HAC 89 of 2018]**

**BETWEEN**

: **LINO FEREI**

***Appellant***

**AND** : **STATE**

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Ms. L. Vaurasi for the Appellant**
: **Ms. S. Kiran for the Respondent**

**Date of Hearing** : **04 June 2020**

**Date of Ruling** : **11 June 2020**

# RULING

[1] The appellant had been charged in the High Court of Suva on one count of rape contrary to section 207(1) and (2) (a) and of the Crimes Act No.44 of 2009. The charge was as follows.

*Statement of Offence*

***Rape:*** *contrary to section 207(1) and (2)(a) of the Crimes Act of 2009.*

*Particulars of Offence*

***LINO FEREI*** *on the 20th day of February, 2018 at Nasinu, in the Central Division penetrated the vagina of* ***MAKI RAIJELI SOSEFO*** *by inserting his finger into the vagina of* ***MAKI RAIJELI SOSEFO,*** *without her consent.*

[2] After full trial, the assessors had expressed a unanimous opinion of not guilty on 03 June 2019. The learned High Court Judge in the judgment delivered on the same day had agreed with the assessors and convicted the appellant of the charge of rape. He was sentenced on 05 June 2019 to 07 years and 11 months of imprisonment with a non-parole period of 03 years and 11 months.

[3] The appellant's solicitors had filed a timely notice of appeal on 26 June 2016 against conviction and sentence. Later there had been a change of solicitors and the appellant's new solicitors had filed an amended notice of appeal on 17 March 2020. An application for bail pending appeal had been made on behalf of the appellant on 27 March 2020. Once again the appellant's solicitors had tendered an amended notice of appeal containing 05 grounds of appeal against conviction and written submissions on 08 May 2020 followed by another written submission on 13 May 2020. The State had tendered its written submissions on 03 June 2020 on both leave to appeal and bail pending applications.

[4] The counsel for the appellant informed court at the hearing on 04 June 2020 that the appellant was not pursuing his appeal against sentence. I find from the appeal record that the appellant had tendered to court in Form 3 under Court of Appeal Rule 39 an application to abandon his appeal against sentence dated 13 may 2020 which has to be determined by the Full Court in due course.

[5] The amended grounds of appeal are as follows.

> *1) **THAT** the learned trial judge had failed in his duty to adequately evaluate the evidence, and the inconsistent statements resulting in a verdict which was unsafe, unsatisfactory and unsupported by the evidence as a whole.*
>
> *2) **THAT** the learned trial judge directions relating to alibi both in law and in respect of the evidence was inadequate in all the circumstances of the case.*
>
> *3) **THAT** the learned trial judge erred in law in failing to adequately explain or give cogent reasons why he chose to disbelieve the appellant's evidence over that of the complainant.*

*4) **THAT** the learned trial judge erred in law in failing to adequately explain or give cogent reasons why he chose to disbelieve the evidence of Roko Kolinio Bale DW2 and Dr Swastika Chand DW3.*

*5) **THAT** the learned judge erred in law and in facts when he failed to consider the following as proved facts in order make reasonable and rational inferences relating to alibi*

*(i) The independent evidence of DW2 that he did meet and speak to the accused that morning on his way to work.*

*(ii) The independent evidence of DW3 confirming that she had commenced work at 7.30am and did attend to the accused as the 6th patient at Valelevu Health centre by 8am or a little after 8am.*

*6) **THAT** the learned trial judge failed to give adequate directions on the law relating to previous inconsistent statements and specifically to material omissions.*

[6] The learned High Court judge has summarized the facts of the case as follows in his judgment.

*5. 'According to the complainant, she woke up on 20/02/18 upon hearing a sound ("door bang") and then the accused was in her room pulling her pants. When she opened her eyes, the accused was on top of her with his finger inside her vagina. She pushed the accused and the accused pushed her back and the accused placed his hands on her sides to prevent her from moving. She said the accused was moving his finger inside her vagina to arouse her and he did this for about 15 to 20 minutes. In the process he also kissed her. She said that at this time only the accused was at home and she knows that the accused's father, the mother and the two siblings leave the house around 6.30am to catch the 6.30 bus.*

*6. The fact that she pushed the accused, the fact that she was looking at the wall crying while the accused was penetrating her vagina, clearly indicates that she did not consent for the accused to penetrate her vagina with his finger and it is clear that the accused knew that she was not consenting.*

*7. According to the complainant this incident started after 6.30am. The accused's evidence was that others living in the house apart from the complainant left the house at 6.30am. The accused's father also confirmed that he left with the others between 6.30am and 6.35am and while they were leaving the accused was awake and the complainant was sleeping.'*

[7] 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 threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

***Law on bail pending appeal***

[8] 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 Vunivayawa 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."*

[9] 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)

[10] 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.'*

[11] 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).'*

[12] 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'*

[13] 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..."*

[14] 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 ....."*

[15] ***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."*

[16] 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. 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.

[17] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[18] 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'.

***01st and 6th grounds of appeal***

[19] The appellant's argument is that the learned trial judge had not addressed the assessors and himself on the alleged inconsistencies in the prosecution evidence. His complaint is based on the complainant's statements to the police and the doctor that the incident happened around 7.00 a.m. whereas her position at the trial had been that it happened after 6.30 a.m. and that according to her what she had told the police was that it took place between 6.30 a.m. and 7.00 a.m. The appellant also submits that after the alleged incident the complainant had called PW 2 at 7.00 a.m. and PW2 had arrived at the house where the alleged incident took place between 7.30 a.m. and 8.00 a.m. Thus, the appellant challenges the credibility of the complainant's allegation based on purported different times stated by the prosecution witnesses. This challenge is interwoven with his defence of *alibi* discussed later.

[20] I find that the learned trial judge had addressed the assessors adequately on inconsistent evidence in paragraph 8 – 10, 54 and 55 of the summing-up and in paragraph 10 of the judgment. He also had drawn their attention to the evidence of the appellant, DW1 and DW2 in the summing-up and addressed the assessors and himself as to why DW2's and DW3's evidence does not discredit the prosecution evidence, particularly PW1 and PW2 in paragraphs 12 and 13 of the judgment as DW3's (doctor) evidence was that she saw the appellant at Valelevu Health Centre around 8.00 a.m. or after 8.00 a.m and DW2 cannot remember the exact time he met the appellant in the morning on the day of the incident.

[21] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of appeal dealt with omissions, contradictions, discrepancies and inconsistences and said *inter alia* that:

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

[22] In ***Bharwada Bhoginbhai Hirjibhai*** the Supreme Court of India also remarked

> *'(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the 'time sense' of individuals which varies from person to person.'*

[23] Therefore, applying the above judicial precedents I am of the view that these grounds of appeal have no reasonable prospect of success or a very high likelihood of success in appeal.

***2nd ground of appeal***

[24] The appellant argues that the directions in the summing-up on law and facts on *alibi* were inadequate. The learned trial judge had dealt specifically with the appellant's *alibi* in paragraphs 42-48 of the summing-up and disbelieved the evidence of the appellant that he left home at 6.45 a.m. and considered DW2 as unreliable as he could not remember the time he left home on the day of the incident when he gave two statements to the police at a time when his memory was still fresh. In any event DW2 whose evidence at the trial was to suggest that he met the appellant between 6.35 a.m. and 7.00 a.m. outside the appellant's house, had said that he could not remember the exact time he met the appellant on the day of the incident. Similarly, according to DW3 she had seen the appellant at Valelevu Health Centre around 8.00 a.m. or after 8.00 a.m. Thus, it appears that it was not impossible for the appellant to have committed the offence at home and be at the medical centre later in the day. However, if PW2's evidence is believed as the assessors and the trial had done, it completely discredits the appellant's *alibi* as when PW2 and the complainant arrived home between 7.30 a.m. and 8.00 a.m. the appellant had still been there and even talked to PW2.

[25] Regarding the directions on law relating to the defence of *alibi*, the appellant's complaint is that what the trial judge had stated in paragraph 46 of the summing-up is inadequate in that he had failed to direct the assessors that it was incumbent upon the prosecution to disprove the *alibi*. Paragraph 46 is as follows.

> *'When an accused takes up the position that he was elsewhere at the time of offence that is known as the defence of alibi. Please bear in mind that though an accused raises the defence of alibi, there is no burden for the accused to prove that he was elsewhere during the time the offence is alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the alibi is not true.'*

[26] In **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words which was reiterated in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020).

> *'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[27] Whether in paragraph 46 of the summing-up, the learned trial judge had conveyed the idea expressed in ***Ram*** and ***Mateni*** substantially on what a direction of *alibi* should be is a question of law alone that can go before the Full Court and leave to appeal is not required.

[28] While dealing with a complaint relating the *alibi* defence in **Pauliasi Raisele v State** AAU 088 of 2018 (01 May 2020), I raised a slightly different question as to whether in addition to what ***Ram*** and ***Mateni*** have prescribed as the proper direction on an *alibi*, the assessors should or should not be directed on the 'intermediate position' namely if *alibi* evidence is neither accepted nor rejected, the resulting position is that a reasonable doubt exists as to the truth of the prosecution evidence, as a question of law to be looked into by the Full Court. The same can arise here as well.

[29] However, the question whether the alleged error or inadequacy in the impugned direction by the learned trial judge on the appellant's *alibi* would adversely affect the end result namely the conviction of the appellant, in my mind, does not have a reasonable prospect of success or very high likelihood of success at this stage because the following observations in **Sharma v State** [2015] FJCA seem to suggest that the learned judge's impugned direction may still be upheld though the prosecution evidence and that of DW2 and DW3 in this case are not irreconcilably conflicting with one another as in ***Sharma***.

> *'[22]..... In **Harron v R** [1996]2 Cr. App. R 458 the Court of Appeal noted that merely because lies consist of stating that the Appellant was at a different place is not decisive whether there is a need for guidance from the trial Judge. At page 463 the Court clarified the position and indicated when a full direction may be required and when it is not necessary to give such a direction.*
>
> *[23] The Court said:*

> *"The difficulty arises from cases in which evidence of witnesses for the (Prosecution) proving guilt is in direct and irreconcilable conflict with the evidence of the accused and his witnesses. In such a case the (assessors) as a matter of logic and common sense have to decide which witnesses are telling the truth. If they accept the evidence for the prosecution it necessarily involves a conclusion that the evidence of the accused is untrue and in such a case the (assessors) would have reached a conclusion that the accused and his witnesses are lying."*

***3rd and 4th grounds of appeal***

[30] The appellant questions whether the learned trial judge has given cogent reasons in his judgment why he chose to disbelieve the appellant's evidence over that of the complainant and DW2 and DW3. Considering the summing-up along with the judgment I think both complaints are devoid of much substance. In the judgment alone the learned trial judge had given concise reasons to explain why he agreed with the assessors.

[31] In any event in terms of section 237 of the Criminal Procedure Act a trial judge is not required to give cogent reasons when he agrees with a unanimous opinion of the assessors. It is only when a trial judge disagrees with the majority of assessors that he has to give cogent reasons which is once again not a statutory requirement but a judicially recommended guideline.

[32] In **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) I had the occasion to deal with section 237 of the Criminal Procedure Act as follows

> *'[9] A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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). In fact, it was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal*
>
> > *'[4] The grounds of appeal against conviction are yet again another example of the scatter gun approach to drafting an appeal notice..... 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.'*

[33] Thus, these grounds have no reasonable prospect of success and logically, a very high likelihood of success is too absent.

***5th ground of appeal***

[34] This ground of appeal is repetitive of parts of appeal grounds 1, 2, 3, 4 and 6. Issues regarding DW2 and DW3 have been raised adequately under all other grounds by the appellant and already dealt with in this Ruling earlier.

[35] In the circumstances, I hold that overall there is no reasonable prospect of success in the appellant's appeal. Nor is there very high likelihood of success in his appeal.

[36] On the other hand it does not appear that the appellant's trial counsel had sought any redirections on the alleged inadequate directions or omissions in the summing-up. Therefore, technically the appellant is not entitled even to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[37] The appellant has not demonstrated any exceptional circumstances to consider bail pending appeal independent of the above considerations.

[37] However, leave to appeal against conviction is allowed as a matter of formality in respect of the second ground of appeal for the reasons set out above and bail pending appeal is refused.

**Order**

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


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