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

CRIMINAL APPEAL NO.AAU 015 of 2018
[In the High Court at Suva Case No. HAC 207 of 2016]

BETWEEN	:	**SAMSON ROBINESH SHRI LAL**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**04 February 2021**
Date of Ruling	:	**05 February 2021**

RULING

[1] The appellant had been indicted on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 28 May 2016 at Suva in the Central Division.

[2] The information read as follows.

Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Act 2009.*

Particulars of Offence

SAMSON ROBINESH SHRI LAL *on 28 May 2016 at Suva in the Central Division murdered Lamuel Franklin Dass.*

[3] After the summing-up on 16 February 2018 the assessors had unanimously found the appellant not guilty as charged. The trial judge on 20 February 2018 had disagreed with the assessors and convicted the appellant of manslaughter. On 21 February 2018 the appellant had been sentenced to 04 years and 10 months imprisonment with a non-parole period of 02 years and 10 months.

[4] The appellant had filed a timely notice of appeal against conviction on 28 February 2018. The Legal Aid Commission on 04 September 2020 had filed an amended notice of appeal with amended grounds of appeal and written submissions on 04 September 2020. An application for bail pending appeal and written submissions had been filed on 29 December 2020. The state had responded by its written submissions on 22 October 2020 and 28 January 2021.

[5] 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.

[6] The grounds of appeal raised by the appellant are as follows.

> *'Ground 1-* *That the learned trial judge erred in law when he failed to give cogent reasons for overturning the assessors' unanimous opinion of not guilty for manslaughter.*
>
> *Ground 2-* *That the learned trial judge erred in law and in fact when he failed to consider the truthfulness of the admission and in turn those inconsistencies should have caused the admissions to be disregarded ad the cautioned interview not to be relied upon.*

Ground 3- *That the learned trial judge erred in law and in fact when he failed to consider the doubts in the State's case in light of the injuries that were found on the deceased ad was the cause of death.*

[7] The facts briefly narrated by the trial judge in the sentencing order are as follows.

> *'On 28/5/16 you unlawfully killed Lamuel Franklin Dass ("Deceased") who was 48 years old. You and the deceased were friends. According to your cautioned interview statement, the deceased started punching you because he got angry when you tried to stop him from touching your mother-in-law's thighs. This happened inside your mother-in-law's house and you said in your evidence that before you came to her house both of you have been drinking alcohol and the deceased was more drunk than you. When the deceased was punching you, you picked a knife and pointed at the deceased. You kept on pointing the knife at the deceased knowing that the deceased was drunk and was coming towards you. The deceased sustained an injury on the left side of the lower chest. This wound continued between the 8th and 9th rib cage causing more incised wounds on the deceased's spleen. You were aware of a substantial risk that your conduct will cause serious harm to the deceased and having, regard to the circumstances known to you, it was unjustifiable for you to take that risk and engage in your aforementioned conduct.'*

01st and 03rd grounds of appeal

[8] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal to arrive at some common principles regarding the duty of trial judges when they agree and disagree with the assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020), **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I do not intend the repeat the same exercise here. However, my conclusions were subsequently summarized in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) as follows.

> *[12] There still appears to be some gray areas flowing from the past 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.*
>
> *[13] What could be ascertained 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the*

*assessors in a concise written 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 a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)].*

*[14] 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 [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*

[15] 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.

*[16] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, 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).*

[9] The evidence relied on by the trial judge to bring home a conviction for manslaughter in the face of the 'not guilty' opinion of the assessors is primarily the cautioned statement of the appellant and in particular the answers to questions 65 and 76 where the appellant had said that when he started pointing the knife at the deceased it struck him on one or two times around the stomach or chest and that he might have struck him with the knife.

[10] The other evidence considered by the trial judge is the medical evidence where the doctor who performed the post-mortem examination had testified that the cause of death was excessive blood loss due to the damaged spleen and the cut to the two major vessels of the right leg. The judge had considered this evidence in the context of lack of any evidence to show that the deceased had suffered an injury to his groin at the appellant's mother-in-law's place where the attack took place but the judge had been satisfied that the appellant had caused the cut injury to the deceased chest area in the course of that attack. The other evidence that had fortified the trial judge's conclusion was that according to medical evidence it would have been very hard for the deceased to have moved around with the cut injury to his leg and he would not have survived more than half an hour to two hours with the leg injury. Yet, there was evidence showing that the deceased had not only reached his flat some distance away and survived for more than 7 ½ hours. Moreover, there had been no traces of blood or blood marks either at the house where the attach took place, on the porch area or on the footpath leading of that house or at the entrance to the deceased's flat and the floor area of the living room in the flat whereas according to the doctor with two major vessels on the right leg being cut there should have been a lot of blood coming out. However, lots of blood had been seen on the deceased's bed inside the room leading to the entrance of the room. Further, none of the witnesses had spoken to having seen any signs of the deceased suffering from a leg injury whereas some of them had seen the left side of the deceased's t-shirt stained red and medical evidence had revealed that the chest injury was on his left side of the lower chest.

[11] In the circumstances, the trial judge had concluded that the appellant was responsible for the stab wound on the left side of the lower chest damaging the spleen but not the stab wound at the right groin area cutting two major vessels.

[12] While this conclusion was possible on the evidence available, as to who caused the more serious stab wound at the right groin area cutting two major vessels leading to lots of bleeding remained unanswered. The defense had suggested to PW4, who claims to have met the deceased a 1.00 a.m. and 8.30 a.m. with blood stains on his t-shirt at his flat and spoken to him (but according to him the deceased had refused his offer to take him to hospital), that he was the one who had inflicted the injuries on the deceased due to the deceased having had an affair with his wife resulting in her leaving him with the child. Yet, all of them were living in the same flat divided by a partition. The deceased was found dead by PW4 at 3.00 p.m. inside his room leaning against his washing machine. Did someone take advantage of the already injured deceased to deliver him the second stab wound to his groin inside the flat incapacitating him from going to hospital? Would the deceased given his condition have voluntarily refused to seek medical attention? The evolving scenario in the case described above inevitably poses these questions without answers. They do not figure prominently in the judgment either.

[13] Be that as it may, the trial judge had further concluded that because the stab wound on the left side of the lower chest damaging the spleen caused by the appellant had significantly contributed to the cause of death and he was aware of the substantial risk that his act of pointing the knife at the deceased would cause serious harm to the deceased, it was unjustifiable for him to have taken that risk and therefore, the fault element of manslaughter had been proved beyond reasonable doubt. Accordingly, the trial judge had convicted the appellant for manslaughter.

[14] Unfortunately, it is not clear from medical evidence whether the stab wound on the left side of the lower chest causing more incised wounds on the spleen had on its own 'significantly contributed' to the cause of death or whether that injury by itself was necessarily fatal or fatal in the ordinary course of nature if there had not been the injury cutting two major vessel on the groin area. The only medical evidence available in the summing-up and the judgment is that the cause of death was excessive blood loss due to the damaged spleen and the cut to the two major vessels of the right leg and there would have been a lot of bleeding from the second injury. What contribution the first injury made to the death of the deceased is not clear.

[15] The accused's act need not be the sole cause, or even the main cause of the victim's death but it is enough that his act contributed significantly to that result as an ingredient of the crimes of murder and manslaughter [vide **R v David Keith Pagett** (1983) 76 Crim. App R. 279 at 288)].

[16] If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound [vide **R v Smith [1959] 2 QB 35 (Courts Martial Appeal Court)]**

[17] The Court of Appeal discussed the issue of causation in detail in **Vakaruru v State** [2018] FJCA 124; AAU94.2014 (17 August 2018) and referred to the above decisions.

[18] Therefore, if it could be affirmatively determined on medical evidence that the stab wound on the left side of the lower chest damaging the spleen had 'significantly contributed' to the cause of death the trial judge's finding that the appellant was guilty of manslaughter cannot be faulted. However, the summing-up or the judgment does not shed sufficient light as to the evidence which persuaded the trial judge to conclude that it was the case. This aspect may have escaped the attention of the trial judge or there may have been evidence on record to support that conclusion which is not borne out by the summing-up or the judgment.

[19] Therefore, I cannot say affirmatively at his sage that the appellant has a reasonable prospect of success on his ground of appeal, but I am inclined to allow the appellant to cavass this issue before the full court *vis-à-vis* his conviction for manslaughter.

02nd ground of appeal

[20] The appellant argues that the trial judge should not have relied on the cautioned interview. I disagree.

[21] The trial judge had analyzed the cautioned interview at paragraphs 16 – 18 of the judgment and concluded that he was satisfied beyond reasonable doubt that the appellant had given all answers recorded herein.

[22] It is in evidence that the cautioned interview had been taken in two days and the appellant's lawyer had been present on the second day when he was interviewed. The appellant alleges that the police had fabricated the answers recorded on the first day including answers to questions 65 and 76. However, at the end of the second day the cautioned statement had been given to the appellant and his lawyer for perusal and both had signed at the very end admitting it to be a true record of the interview. If it had been fabricated by the police there was no reason or difficulty for them to have recorded an admission regarding the stab injury on the deceased's groin area too because the investigating officer had seen that injury on the dead body when he visited the deceased's house. Further, had the cautioned statement been a fabrication the police could have recorded more straightforward admissions of the appellant's attack on the deceased at his mother-in-law's house rather than indirect answers to questions 65 and 76.

[23] This ground of appeal has no reasonable prospect of success.

Bail pending appeal application

Law on bail pending appeal.

[24] 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."*

[25] 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)

[26] 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.'*

[27] 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).'*

[28] 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'*

[29] 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...."*

[30] 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 ... ."*

[31] ***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."*

[32] 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.

[33] 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.

[34] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court 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'.

[35] As already pointed out, it is not possible to say affirmatively that the appellant has a reasonable prospect of success in his appeal and therefore, he cannot reach the requirement of 'very high likelihood of success'. He had not shown other exceptional circumstances either.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL