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

CRIMINAL APPEAL NO.AAU 076 of 2018
[In the High Court at Suva Case No. HAC 383 of 2016S]

BETWEEN	:	**WAME BALEIMAKOGAI** **NAPOLIONI LEILOMA** **LUKE SOROVAKATINI**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. K. R. Prasad for the 01st Appellant** **02nd Appellant in person** **03rd Appellant in person**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**19 February 2021**
Date of Ruling	:	**01 March 2021**

RULING

[1] The appellants had been indicted in the High Court of Suva with another (the 04th accused and the appellant in AAU 073 of 2018) as the 01st, 02nd and 03rd accused on four counts of rape [sections 207(1) & (2) (a) and 207(1) & (2) (c) the Crimes Act, 2009] relating to two complainants (R.N.H & O.R.) committed at Waimaro, Tailevu in the Eastern Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

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

Particulars of Offence

WAME BALEIMAKOGAI , NAPOLIONI LEILOMA *and* ***LUKE SOROVAKATINI*** *between the 9th day of October, 2016 and the 10th day of October, 2016, at Waimaro, Tailevu in the Eastern Division, had carnal knowledge of* ***R.N.H****. without her consent.*

COUNT TWO

Statement of Offence

RAPE: *Contrary to Section 207(1) and (2)(c) of the Crimes Act 2009.*

Particulars of Offence

NAPOLIONI LEILOMA *between the 9th day of October, 2016 and 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, penetrated the mouth of* ***R.N.H.*** *with his penis without her consent.*

COUNT THREE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2)(c) of the Crimes Act 2009.*

Particulars of Offence

NAPOLIONI LEILOMA *between the 9th day of October, 2016 and the 10th day of October, 2016 at Waimaro, Tailevu in the Eastern Division, penetrated the mouth of* ***O.R.*** *with his penis without her consent.*

COUNT FOUR

Statement of Offence

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

Particulars of Offence

WAME BALEIMAKOGAI , NAPOLIONI LEILOMA *and* ***SANJAY LAL between*** *the 9th day of October, 2016 and the 10th day of October, 2016 at Waimaro****,*** *Tailevu in the Eastern Division, had carnal knowledge of* ***O. R.*** *without her consent.*

[3] The trial judge had summarized the prosecution evidence as follows in the sentence order.

2. The brief facts of the case were as follow. On 9 October 2016, the four of you were travelling in a rental car registration number IQ 893, driven by Accused no. 4, around Nausori Town. You met the two complainants (PW1 and PW2) in front of Deoji shop at about 9 pm, and invited them into the car. All of you then went for a joy ride around Nausori Town, then to Waidalice, then to Korovou Town, and to the secluded spot at Waimaro, Tailevu. Accused no. 4 was driving the car. Accused no. 1 was the front seat passenger. Accused no. 2 was sitting behind the driver in the back seat, while Accused no. 3 was sitting behind the front seat passenger, and PW1 and PW2 were sitting between Accused no. 2 and Accused 3, in the back seat.

3. When the six of you reached the secluded spot at Waimaro Tailevu, you all got out of the car and surrounded PW1 and PW2, who were still in the car. Accused No. 2, you then went to PW2 and forcefully dragged her out of the car. PW2 then yelled at the top of her voice to raise the alarm. Accused no. 4, you then punched her on the mouth to stop her yelling and to intimidate her. PW1 saw the above and it made her scared. Then you all took turns on the two complainants by inserting your penis into their vaginas, without their consents, and all of you well knew they were not consenting to the same at the time. Accused no. 2, you further inserted your penis into the complainants' mouths, without their consent, and you well knew, they were not consenting to the same, at the time.

[4] The 01st and 03rd appellants had remained silent at the trial and not called any witnesses while the 02nd and 04th appellants had given evidence at the trial.

[5] At the end of the summing-up on 13 July 2018 the assessors had unanimously opined that the appellants were not guilty of all charges levelled against them. The learned trial judge had disagreed with the unanimous opinion of the assessors in his judgment delivered on 16 July 2018, convicted the appellants of all charges and sentenced them on 20 July 2018 as follows.

(i) Count No. 1: Rape:	Accused No. 1 – 9 years imprisonment Accused No. 2 – 9 years imprisonment Accused No. 3 – 8 years imprisonment
(ii) Count No.2: Rape:	Accused No. 2 – 9 years imprisonment
(iii) Count No.3: Rape:	Accused No.2 – 9 years imprisonment
(iv) Count No.4: Rape:	Accused No. 1 – 9 years imprisonment Accused No., 2 – 9 years imprisonment

[6] The appellants' timely notice of appeal/application for leave to appeal against conviction and sentence had been filed on 31 July 2018. The Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of the 01st appellant on 29 June 2020. The 02nd appellant relies on his amended grounds of appeal and written submissions filed on 24 August 2020. He abandons his additional grounds of appeal tendered on 19 November 2020. The 03rd appellant relies on his additional grounds of appeal filed on 18 June 2020, written submissions dated 29 June 2020 and additional grounds and submissions dated 24 August 2020. The 02nd (10 September 2020 & 10 November 2020) and 03rd (25 June 2020 & 26 November 2020) appellants had filed bail pending appeal applications and written submissions. The state had tendered its written submissions on 25 November 2020.

[7] 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.

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable**

there must be a reasonable prospect of its success in appeal. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[9] Grounds of appeal urged on behalf of the appellants are as follows.

01st appellant (29.06.2020)

Ground 1

The conviction was unreasonable and cannot be supported by evidence, more particularly as to the inconsistencies in evidence of the first and second complainant as follows:

(i) The plausibility of the First Appellant being present with the first and second complainant(s) concurrently when according to the evidence, there was no proximity of the first and second complainant's with one another;
(ii) The plausibility of the First Appellant being present with the first and second complainants(s) concurrently when according to the evidence, the time spent with the first and second complainant's are concurrent.

Ground 2

The Learned Trial Judge erred in fact and law in not giving cogent reasons for overturning the unanimous not guilty opinion of the Assessors and in finding Guilt and Convicting the First Appellant.

02nd appellant (24.08.2020)

(A). That the Learned Trial Judge erred in law and in fact by overruling the Assessors unanimous opinion of "Not Guilty" contrary to his own directions to the Assessors.

(B) That the Learned Trial Judge erred in law and in fact in that whilst applying the laws on overruling the verdict of the Assessors as he did, he did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the three Assessors in light of the whole of the evidence presented in the trial. In Ram Bali v Reginam 7 FLR 80.

(C) That the Learned Trial Judge erred in law and failed to consider to define Section 46 the Principle of join enterprise in his Summing Up "when two or more reasons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the

Prosecution of such purpose an offence is committed of such a nature that its Commissions was a probable consequence of the Prosecution of such purpose, each of them is deemed to have committed the offence."

(D) That the Learned Trial Judge erred in law and failed to consider that the Medical Report was not tendered by the Prosecutions to establish the complainant's alleged allegations and fabrication of Rape.

(E) That the Learned Trial Judge erred in law and in fact when he failed to properly consider the inconsistencies of the Complainant (Ro Namela Halaiwalu) evidence during the cross examination.

(F) That the Learned Trial Judge erred in law in allowing a dock identification parade thus failed to apply a "Turnbull Guidelines." R v TURNBULL [1997] 63 CR APP R 132, the guidelines are applied to assist the identification evidence. See judgment page [5] paragraph [11].

(G) That the Learned Trial Judge erred in law in not giving the Assessors sufficient warning regards to defence case evaluation of evidence, medical report, inconsistently complainants evidence and other directions.

(H) That the Learned Trial Judge erred in law when he failed to give cogent reasons when he rejected the unanimous of the opinion of the Assessors.

(I) That the Learned Trial Judge erred in law and in fact when he confused himself by stating that the Assessors findings was not perverse and open to them to reach such conclusion but on the other hand rejected the unanimous not-guilty findings of the Assessors.

(J) That the Learned Trial Judge erred in law and in fact when he failed to properly consider the re-directions that were raised by my counsel after the summing up.

03rd Appellant (18.06.2020)

a. That the Trial Judge erred in law and in fact when he failed to apply the law and failed to give cogent reasons while he rejected unanimous opinion of the assessors of not guilty. That under Section 237(1)(2)(4)(5) of the Criminal Procedure Act 200p which stated as follows when the Judges does not agree with the majority opinion of the assessors the Judge shall give reason for differing with the majority opinion shall be:

i) Written down
ii) Pronounce in open court.

b. *That the Trial Judge erred in law and in fact when he confused himself by stating that the assessors' findings were not perverse and open to them reaching such conclusion but on the other hand I rejected the unanimous not guilty findings of the assessors.*

c. *That the Trial Judge erred in law and in fact when he failed to properly consider the inconsistencies of the complainant's (Ro Namela Halaiwalu) evidence during the cross-examination.*

d. *That the Trial Judge erred in law and in fact and failed to direct the assessors that there is no evidence linked to Accused 3 as His Lordship failed to consider that there is no evidence of alleged rape against Accused 3.*

e. *That the Learned Trial Judge erred in law and in fact when he failed to consider and give a direction to the assessors regards inconsistency and contradiction and reliability of the evidence given by the witness evidence.*

f. *That the Prosecution failed to prove their case against Accused 3, Luke Sorovakatini on reasonable doubt that there is no evidence linking accused 3 to the alleged offence of rape contrary to section 207(1) and (2)(a) of the Crimes Act of 2009.*

g. *That the Prosecution failed to tender the evidence of medical report against all 4 accused during the trial that there was no evidence to prove alleged rape.*

h. *That the Learned Trial Judge erred in law to direct the assessors regards to medical report or expect opinion to the assessors in the summing up. Thus, the prosecution failed to prove their case on reasonable doubt.*

Additional grounds of appeal (24.08.2020)

Ground H

That the Learned trial Judge erred in law and failed to consider to define section 46 the principle of joint enterprise in his summing up.

Ground I

That the Learned Trial Judge erred in law and in fact when he failed to properly consider the re-directions that were raised by my counsel after the summing up.

Ground J

That the Learned Trial Judge erred in law when he failed to give count to cogent reason when he rejected the unanimous of the opinion of the assessors.

Ground K

That the Learned Trial Judge erred in law and in fact when he confused himself by stating that the assessors findings was not perverse and open to them reach such conclusion but on the other hand rejected the unanimous not guilty of the assessors.

[10] It is convenient to consider several grounds together as they are either the same or similar in substance. 01st appellant's grounds of appeal No.2, 02nd appellant's grounds of appeal Nos. A, B, H & I and the 03rd appellant's grounds of appeal Nos. a, b, J and K would be dealt with together as they collectively represent the main contention of the appeal namely the trial judge's alleged failure to give cogent reasons to overturn the assessors' unanimous opinion.

[11] I had embarked on an analysis of this aspect before in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020), **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 concluded *inter alia* as follows.

> *'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.'*
>
> *'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)]'*
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> *'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.'

'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).'*

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

'[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.'

[13] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) where the trial judge had overturned the unanimous opinion of 'not guilty' by the assessors, the Supreme Court reiterated that

'*[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.'*

[14] The trial judge had stated in the judgment that

'6. …….. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the unanimous guilty opinion of the three assessors.'

'7. ……During the trial, I have carefully listened to their evidence, carefully analysed them and generally observed their demeanour. In addition to the above, I had observed how they answered defence counsel's cross-examining questions, in an attempt to determine their credibility.'

[15] Unfortunately, the said analysis or assessment of evidence is not sufficiently reflected in the judgment. Therefore, viewed in the light of the past decisions cited above, I am of the view that the learned trial judge does not seem to have undertaken an independent assessment and evaluation of the evidence. The trial judge's mere statements that he accepted the prosecution evidence, particularly that of the two complainants in all respects and found them to be credible, do not satisfy or measure up to the requirements laid down by previous judicial pronouncements as to the 'cogent reasons' founded on the weight of such evidence reflecting on the credibility of the complainants (and the 02nd and 04th appellants who have given evidence) on the contested issues at the trial in differing from the opinion of the assessors.

[16] In **Johnson v State** [2013] FJCA 45; AAU90 of 2010 (30 May 2013) the state had not disputed that a failure to comply with the statutory requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge

overrides the opinion of the assessors. However, it may be argued that the reasons could be readily inferred from the summing-up and the judgment and the trial judge cannot anyway give reasons why he is disagreeing with the assessors as their reasons are not known and all what the trial judge could do is to provide his own independent reasons for concluding that he is either sure or not sue of guilt of the appellant. However, what section 237(4) of the criminal Procedure Act, 2009 requires the trial judge to do is to give reasons why he is disagreeing with the opinion of the assessors; not their reasons. In any event, in my view, the trial judge had not given adequate reasons of his own for the overturning the assessors' opinion.

[17] When the assessors had expressed their opinion *inter alia* considering the directions given by the trial judge that the appellants were not guilty of all counts and when the judge himself had said in his judgment that their opinion was not perverse and it was open for them to come to their conclusion on evidence, in my view it was incumbent upon the trial judge to have thoroughly analyzed and evaluated both versions independently and set down his own reasons why he was deciding that the appellants were guilty. The judgment should be weightier, go deeper and beyond what the judge had stated in the summing-up. The trial judge had unfortunately failed to do that.

[18] However, it can be argued that the consequence of failure to give 'cogent' reasons would not necessarily guarantee success for the appellant in appeal, for this court can adequately discharge its appellant function independent of the said failure on the part of the trial judge. The argument goes further to state that section 237(4) is silent on the consequence of failure to adhere to the section by the trial judge *i.e.* to give reasons in differing with the assessors and that while such a failure may constitute an error of law it does not follow that such failure would necessarily amount to a miscarriage of justice or for that matter a substantial miscarriage of justice. In other words, lack of cogent reasons alone cannot found a successful appeal unless there has been a miscarriage of justice. There seems to be some merits in this argument.

[19] In other words, the argument goes to state that irrespective of whether the trial judge had failed to give cogent reasons in the judgment in disagreeing with the assessors, still the Court of Appeal could independently assess evidence to determine whether there is any ground enumerated in section 23 Court of Appeal Act upon which the

verdict should be set aside and if not, the verdict would not be disturbed. The appellate function is prescribed by section 23 of the Court of Appeal Act.

[20] While it can be argued that it is open for this court to do that, this task should be undertaken by the full court after considering all the evidence led in the case. Further, this proposition of law advanced by the state at the leave to appeal hearing in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) seems to formulate a new test when a guilty verdict is challenged on the basis that the trial judge had failed to give cogent reasons for overturning the assessors' opinion. To that extent, it poses an important question of law which needs to be addressed by the full court.

[21] Therefore, at the leave to appeal stage a credible and sustainable complaint based on the failure on the part of the trial judge to give cogent reason to overturn the assessors' opinion is sufficient to allow leave to appeal to the full court for it to embark on the appellate function within the purview of section 23 of the Court of Appeal Act.

[22] Therefore, I am inclined to allow leave to appeal to the Court of Appeal on this question of mixed law and fact raised by the appellant and the question of law raised by the state in ***Raj*** (supra) on the legal consequences of an apparent failure on the part of the trial judge to give cogent reasons.

[23] However, I make no decision and am not in a position to make any judgment as to whether there is a reasonable prospect of success in appeal as far as the appellants are concerned as it is a matter only the full court with the benefit of the trial proceedings could decide.

01st appellant

[24] The 01st appellants' first ground of appeal involves a question of facts and cannot be analyzed without trial proceedings at this stage. Accordingly, leave to appeal is refused but it could be taken up by the full court, if renewed by the 01st appellant.

02nd appellant

[25] I do not think that given the facts of the case a direction under section 46 of the Crimes Act, 2009 on joint enterprise was required as all the appellants were sought to be made liable on their individual acts. Ground (C) has no reasonable prospect of success in appeal.

[26] The state had not relied on medical evidence and produced a medical report to establish its case. The trial judge had given his mind to this aspect at paragraph 9 of the judgment in the light of section 129 of the Criminal Procedure Act, 2009. Ground (D) has no reasonable prospect of success in appeal. In any event the appellant could have sought to lead such evidence, if it was helpful to his defense.

[27] The complaint under appeal ground (E) could be considered along with the main ground of appeal dealt with earlier. No leave is specifically required for this ground of appeal.

[28] The trial judge seems to have touched on relevant aspects of Turnbull guidance of identification at paragraph 34 and 40 of the summing-up and directed himself fully at paragraph 11 of the judgment. The complainants had interacted with the appellants for about 45 minutes. In the circumstances, the complaint of first time dock identification has to be looked at in the light of the test which I had indicated in a number of rulings one of which is **Vunivesi v State** [2020] FJCA 112; AAU0010.2018 (29 June 2020). At this stage I do not see a reasonable prospect of success in appeal for this ground under (F).

[29] The complaint under appeal ground (G) could be considered along with the main ground of appeal dealt with earlier. No leave is specifically required for this ground of appeal. However, the fact is that the assessors had thought that the appellant was not guilty despite the matters complained of by the appellant in the summing-up.

[30] I cannot even consider the appeal ground (J) without the court record and as the appellant had been found not guilty, the absence of the alleged redirections had not really mattered. I do not see a reasonable prospect of success in appeal for this ground of appeal at this stage.

Bail pending appeal

[31] I have expressed the following views on bail pending appeal after an analysis of several past decisions in the number of rulings delivered before.

> ***"****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.****"***
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> ***"****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.****"***
>
> ***"****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'.****"***

[32] As I have already pointed out I cannot conclude that the appellant has even a reasonable prospect of success in his appeal at this stage but leave to appeal has been granted as the trial judge was found not to have given adequate cogent reasons for differing from the opinion of the assessors so as to allow the full court to examine the evidence in detail. Therefore, the 02nd appellant's appeal cannot be said to have a 'very high likelihood of success'.

[33] Accordingly, bail pending appeal is refused for the 02nd appellant.

03rd appellant

[34] Appellant's appeal grounds **'c', 'd', 'e'** and **'f'** could be considered together. While the alleged non-directions under'd' may not have had an adverse impact on the

assessors' opinion of 'not guilty', it along with the complains relating to 'c', 'e' and 'f' could be considered by the full court when it analysis the totality of evidence under the main ground of appeal which has been allowed to go to the full court.

[35] The state had not relied on medical evidence and produced a medical report to establish its case. The trial judge had given his mind to this aspect at paragraph 9 of the judgment in the light of section 129 of the Criminal Procedure Act, 2009. Thus, grounds **'g'** and **'h'** have no reasonable prospect of success in appeal. In any event the appellant could have sought to lead such evidence,if it was helpful to his defence.

[36] Given the facts of the case a direction under section 46 of the Crimes Act, 2009on joint enterprise was not required as all the appellants were sought to be made liable on their individual acts. Ground (H) has no reasonable prospect of success in appeal.

[37] I cannot even consider the appeal ground (I) without the court record and as the appellant had been found not guilty, the absence of the alleged redirections had not really mattered. I do not see a reasonable prospect of success in appeal for this ground of appeal at this stage.

Bail pending appeal

[38] I have expressed the following views on bail pending appeal after an analysis of several past decisions in the number of rulings delivered before.

> ***"****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.****"***
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> ***"****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.****"***
>
> ***"****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'."

[39] As I have already pointed out I cannot conclude that the appellant has even a reasonable prospect of success in his appeal at this stage but leave to appeal has been granted as the trial judge was found not to have given adequate cogent reasons for differing from the opinion of the assessors so as to allow the full court to examine the evidence in detail. Therefore, the 03rd appellant's appeal cannot be said to have a 'very high likelihood of success'.

[40] Accordingly, bail pending appeal is refused for the 03rd appellant.

[41] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

'……..Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based…….'

[42] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[43] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[44] Though, the appellants had initially appealed against sentence no grounds of appeal had been raised or submissions made on the sentence appeals to demonstrate that there is a sentencing error. In the circumstances sentence appeals are deemed frivolous and vexatious and dismissed under section 35(2) of the Court of Appeal Act.

Orders

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is dismissed in terms of section 35(2) of the Court of Appeal Act in respect of all appellants.
3. Bail pending appeal is refused for the 02nd appellant.
4. Bail pending appeal is refused for the 03rd appellant.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL