

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

CRIMINAL APPEAL NO. AAU 088 of 2018
[High Court of Lautoka Case No. HAC 106 of 2015]

BETWEEN : **PAULIASI RAISELE** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, RJA**

Counsel : **Mr. N. Tuifagalele for the Appellant**
Mr. R. Kumar for the Respondent

Date of Hearing : **14 December 2023**

Date of Ruling : **21 December 2023**

RULING ON BAIL PENDING APPEAL

[1] The appellant had been charged in the High Court of Lautoka on one count of rape of the complainant, 17 years of age, contrary to section 207(2) (a) and of the Crimes Act No.44 of 2009.

[2] After full trial, two out of three assessors had expressed an opinion of guilty on 10 August 2018. The Learned High Court Judge in the judgment dated 13 August 2018 had agreed with the majority of assessors and convicted the appellant of the charge of rape. He was sentenced on 24 August 2018 to 11 years and 11 months of imprisonment with a non-parole period of 10 years.

[3] The appellant's counsel had filed a timely notice of appeal and grounds of appeal on 13 September 2018 against conviction and sentence. By the Ruling delivered by a

judge of this court on 01 May 2020¹ leave to appeal against conviction was allowed on one ground of appeal and leave to appeal against sentence was refused.

[4] The evidence presented by the prosecution and as narrated by the learned High Court judge is briefly as follows:

'(i) On 25 January, 2015 the victim was alone at home since the other family members had gone to church. After cooking, she went to have her shower in the bathroom. Whilst in the bathroom, the accused came and opened the bathroom door. The bathroom did not have a lock. When the accused opened the bathroom door, the victim was wearing her bra and panty, the victim screamed and told the accused that he was not supposed to be doing this and he was not to come inside the bathroom.

(ii) The accused told the complainant that he wanted to have a relationship with her. The complainant replied that this cannot be because he was her brother in law. The accused wanted to have sexual intercourse with her and said that he was the boss of the house and he was the one who looks after everyone in the house.

(iii) The accused pushed the victim on the floor removed her panty and forcefully inserted his penis into her vagina. After having sexual intercourse the accused told the victim not to tell his wife about what had happened.

(iv) The victim was scared and did not know what to do she felt numbness from her hip downwards. The victim did not consent to what the accused had done to her.

(v) The matter was later reported to the police.'

[5] The appellant had completely denied the allegation, given evidence and called two witnesses on his behalf at the trial. His defense was one of *alibi* on the basis that he was at work from 4.00 a.m. to 1.00 p.m. on the day of the alleged incident at Nadi airport as an employee of Air Terminal Services Ltd and relied on the Time Sheet marked exhibit 6 to prove his position.

¹ Raisele v State [2020] FJCA 49; AAU088.2018 (1 May 2020)

[6] Leave to appeal had been granted based only on *alibi* directions as a matter of law as follows.

[28] I think that it is in the light of these decisions that one should reconsider as to what the appropriate direction particularly on the intermediate position on alibi defence should be in Fiji. However, it is within the domain of the Full Court of the Court of Appeal to make a pronouncement, if considered appropriate, at least for future guidance.

[29] Therefore, while I make no pronouncement whether there is a reasonable prospect of success in the appeal or not on the 01st ground of appeal urged by the appellant for want of full court record, I think on the question of law above highlighted the appellant should be given leave to go before the Full Court so as to inter alia afford the Court with an opportunity to clarify the law. I believe that the application or otherwise of the proviso section 23(1) of the Court of Appeal Act too may figure in the decision of the Court.'

[7] The appellant had made an application for bail pending appeal in June 2023 and both parties agreed to have a ruling on bail pending appeal application on the written submissions filed.

Law on bail pending appeal

[8] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA

100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [9] 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 direct relevance, practical purpose or result.
- [10] If the 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 may 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’.
- [11] A judge of this court has already held that leave to appeal was being allowed on the conviction appeal on a question of law only and not based on ‘reasonable prospect of success’ of the appeal itself [see **Waqasqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)]. Therefore, the requirement of ‘very high likelihood of success’ for bail pending appeal is not satisfied.
- [12] If I may consider (though not legally required) the time possibly taken to hear the appeal by the full court and what part of the sentence the appellant will have served by then, the full court is currently taking up appeals filed in 2018 as well for hearing. Since only 05 years and 04 months have passed since the appellant was sentenced, he still has to serve the rest of the period of 11 years and 11 months subject to the non-parole period of 10 years and remission earned whilst serving the sentence. There is


no risk that the appellant will have served a substantial portion of the sentence by the time his appeal is heard by the full court.

[13] If the appellant's counsel could have the appeal records ready sooner than later, there is a possibility that the appellant's appeal be heard by the full court in the first half of next year.

Orders of the Court:

1. Bail pending appeal is refused.
2. Court of Appeal Registry is directed to liaise with Lautoka High Court and take all steps to release the documents necessary for the preparation of appeal records without delay.




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

Solicitors:

Tuifagalele Lawyers for the Appellant

Office for the Director of Public Prosecutions for the Respondent