<u>IN THE COURT OF APPEAL, FIJI</u>
<u>[On Appeal from the High Court]</u>

<u>CRIMINAL APPEAL NO. AAU 017 of 2022</u>
[In the High Court at Suva Case No. HAC 077 of 2020LAB]

<u>BETWEEN</u> : **<u>JOSAIA NAIKALIVOU</u>**

<u>Appellant</u>

<u>AND</u> : **<u>THE STATE</u>**

<u>Respondent</u>

<u>Coram</u> : **Prematilaka, RJA**

<u>Counsel</u> : **Ms. P. Mataika for the Appellant**
: **Ms. L. Latu for the Respondent**

<u>Date of Hearing</u> : **25 March 2024**

<u>Date of Ruling</u> : **26 March 2024**

<u>RULING</u>

[1] The appellant had been changed at Labasa High Court on the following counts:

'<u>COUNT ONE</u>

<u>Statement of Offence</u>

***<u>SEXUAL ASSAULT</u>**: Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

<u>Particulars of Offence</u>

***JOSAIA NAIKALIVOU**, between the 1st of January 2019 and the 31st day of December 2019, at Burenicagi Settlement, Naweni in the Northern Division, unlawfully and indecently assaulted "V.B.", by fondling her breasts.*

<u>COUNT TWO</u>

<u>Statement of Offence</u>

***<u>INDECENT ASSAULT</u>**: Contrary to Section 212 (1) of the Crimes Act 2009.*

Particulars of Offence

***JOSAIA NAIKALIVOU** , between the 1st of January 2019 and the 31st day of December 2019, at Burenicagi Settlement, Naweni in the Northern Division, unlawfully and indecently assaulted "V.B.", by touching her thighs.*

COUNT THREE

Statement of Offence

***INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Act 2009.*

Particulars of Offence

***JOSAIA NAIKALIVOU**, between the 1st of January 2019 and the 31st day of December 2019, at Burenicagi Settlement, Naweni in the Northern Division, unlawfully and indecently assaulted "V.B.", by touching her mouth*

COUNT FOUR

Statement of Offence

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

Particulars of Offence

***JOSAIA NAIKALIVOU**, between the 1st of January 2020 and the 31st day of August 2020, at Burenicagi Settlement, Naweni in the Northern Division, penetrated the vagina of "V.B.", with his finger without her consent.*

COUNT FIVE

Statement of Offence

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

Particulars of Offence

***JOSAIA NAIKALIVOU**, between the 1st of January 2020 and the 31st day of August 2020, at Burenicagi Settlement, Naweni in the Northern Division, had carnal knowledge of "V.B.", without her consent.*

COUNT SIX

Statement of Offence

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

Particulars of Offence

__JOSAIA NAIKALIVOU__, on an occasion other than that referred to in Count 5 between the 1st of January 2020 and the 31st day of August 2020, at Burenicagi Settlement, Naweni in the Northern Division, had carnal knowledge of "V.B.", without her consent.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

__JOSAIA NAIKALIVOU__, on an occasion other than that referred to in Count 5 and Count 6 between the 1st of January 2020 and the 31st day of August 2020, at Burenicagi Settlement, Naweni in the Northern Division, had carnal knowledge of "V.B.", without her consent.'

[2] The High Court judge convicted the appellant of all counts on 11 February 2022 and sentenced him to a final sentence of 13 years imprisonment for all counts with a non-parole period of 11 years imprisonment.

[3] The appellant's appeal against conviction is timely.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The victim's evidence had been summarised by the trial judge in the sentencing order as follows:

> 2. *The brief facts, as found by the court, after a defended hearing, were as follows. The female complainant (PW1) was 14 years old, at the time of the offences. You were 64 years old at the time. There was a 50 years age gap between the two of you. You were related to the complainant's family by marriage. At the time of the offences, your wife was residing in America. You had a two storey house in the settlement, and the complainant's family were your neighbours. You often invited the complainant and her 9 year old brother to come to your house to play and watch movies with you twin sons.*
>
> 3. *On one occasion, sometimes between 1 January 2019 and 31 December 2019, the complainant came to your house with her younger brother to play with your twin sons and watch movies. Because it was late, she and her brother slept in your house. You told her to sleep in a bedroom. When she was asleep, you went to her. She woke up. You then fondled her breasts, touched her thighs and touched her mouth (counts no. 1, 2 and 3).*
>
> 4. *Again, sometime between 1 January 2020 and 31 August 2020, the complainant and her younger brother were at your house to play with your twins and watch movies. After the movies, they slept with the twins in the sitting room. Late at night, you carried the complainant into a bedroom and you forced yourself on her. You first penetrated her vagina with your fingers, and later you inserted your penis into her vagina, without her consent. You knew she was not consenting to the above, at the time (counts no. 4 and 5).*
>
> 5. *Again, sometime between 1 January 2020 and 31 August 2020, while the complainant was going to the river to bath, you dragged her into your dalo patch, and forcefully penetrated her vagina with your penis, without her consent. You knew she was not consenting at the time (count no. 6). Again, sometime between 1 January 2020 and 31 August 2020, you repeated what you did in count no. 5 to the complainant at your house (count no. 7). You had been tried and convicted of four rape counts, one sexual assault and two indecent assault counts in the High Court.*

[6] The grounds of appeal urged by the appellant against conviction are as follows:

'***<u>Ground 1:</u>***

<u>THAT</u> *the Learned Trial Judge erred in law and facts by not directing himself to Liberato direction and applying the principle of that direction.*

<u>Ground 2:</u>

<u>THAT</u> *the Learned Judge erred in law in failing to give cogent reasons as to why he did not accept the appellant's version.*

[7] The prosecution case was entirely based on the 14 year old victim's evidence. The appellant, 64 years of age also gave evidence for the defence and pleaded 'consensual sex' as a defence to counts 5-7 and denied allegations altogether in counts 1- 4. It was an agreed fact that the appellant had sexual intercourse with the victim as alleged in counts 5-7.

Ground 1

[8] The trial judge had accepted in the judgment that *'the case will be decided on the credibility of the complainant's version of events as that against the accused's version of events'* which shows that it was the victim's word against the appellant's word.

[9] In **Murray v The Queen** (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In **R v Li** (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.

[10] Secondly, when a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it was held in **Anderson** (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a ***Liberato*** *direction* be framed along the following lines **(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

[11] In addition to the general burden and standard of proof set out at paragraph 4 of the judgment, the trial judge does not appear to have given his mind to the principles in ***Anderson*** in dealing with the conflicting evidence of the victim and the appellant on the issue of consent on counts 5-7. It is for the full court to decide when the transcript is read as a whole, whether the trial did miscarry by reason of the omission of a modified ***Liberato*** direction [**De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019)]

Ground 2

[12] There is not a single statement in the judgment of the appellant's defence of consensual sex to counts 5-7 leave aside an analysis and evaluation of the defence case of denial on counts 1-4 and consent on counts 5-7. This is against the principles adopted in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) where the trial judge had failed to explain and analyse the defence case of consent to the assessors in a word against word situation.

[13] For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> '*[23] …………**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct*

> *from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence.* ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[14] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[15] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[16] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[17] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carry out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other

inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[18] Therefore, it is for the full court to see whether the verdict is unreasonable or unsupported by evidence after examining the record.

[19] It appears that both grounds of appeal have some merit but the more pressing and the real concern, to my mind, is the inadequacy of reasons in the judgment for the rejection of the appellant's evidence of denial and consent respectively.

[20] I had the occasion to consider the issue of inadequate reasons in somewhat detail in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023) and **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023) and the proposition of law, I arrived at is as follows:

> *'Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial.'*
>
> *'If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an*

error of law within the meaning of section 23 of the Court of Appeal Act. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.'

[21] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that there is adequate reasons for the rejection of the appellant's version. However, whether the inadequacy of reasons has resulted in a substantial miscarriage of justice as opposed to a mere error of law amounting a miscarriage of justice, is a matter for the full court to decide upon reading the transcript of trial proceedings.

Law on bail pending appeal

[22] 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)].

[23] 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.

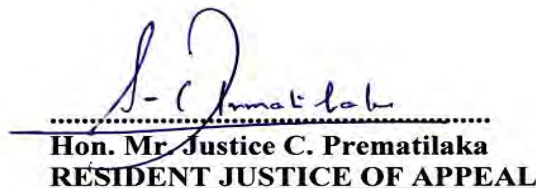
[24] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[25] I am allowing leave to appeal against conviction to enable the full court to examine the transcript to decide whether the verdict is reasonable and can be supported by the totality of evidence and not because of any real 'reasonable prospect of success' of the appeal itself [see **Waqasaqa 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.

[26] In the circumstances, I am not inclined to release the appellant on bail pending appeal at this stage.

Orders of the Court:

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



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

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent