IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. ABU 155 of 2016
(High Court No. 30 of 2015)

BETWEEN : 1. **MANASA TALALA**
2. **SERUVI CAQUSAU**
3. **KELEVI SEWATU**
4. **PENAIA DRAUNA**
5. **FILISI VERE**
6. **VILIAME VEREIVALU**
7. **JONA DAVONU**
8. **PITA MATAIRAVULA**
9. **SENITIKI NAKATASAVU**

Appellants

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr. I. Khan for the Appellants**
Mr. L. J. Burney for the Respondent

Date of Hearing : **19 May 2017**

Date of Ruling : **4 July 2017**

RULING

[1] The Appellants were jointly charged with 2 counts of Rape and 2 counts of Sexual Assault and the 1st and 6th Appellant were further charged with Defeating the Course of Justice, the victims being Vilikesa Soko and Senijeli Boila who had been in Police custody.

[2] All the Appellants were convicted after trial before the High Court at Lautoka of the 2 counts of rape contrary to Section 207(10 and (2)(a) read with sections 45 and 46 of the Crimes decree and 2 counts of sexual assault contrary to section 210(1)(a) read with sections 45 and 46 of the Crimes. The 1st and 6th Appellants were also found guilty of separate counts of Defeating the Course of Justice contrary to section 190(e) Crimes Decree.

[3] The Assessors had returned unanimous mixed opinions that the 4th to 9th appellants were guilty of raping and sexually assaulting Soko and all appellants were not guilty of the other counts.

[4] The learned trail Judge in his judgment dated 11 November 2016 accepted the guilty opinion of the Assessors and gave his reasons for finding the not guilty opinions to be perverse.

[5] The Appellants were sentenced as follows:

1st Appellant – 8 years imprisonment with a non-parole period of 5 years;

2nd Appellant – 8 years imprisonment with a non-parole period of 5 years;

3rd Appellant - 7 years imprisonment with a non-parole period of 4 years;

4th Appellant – 7 years imprisonment with a non-parole period of 4 years;

5th Appellant – 9 years imprisonment with a non-parole period of 6 years;

6th Appellant – 9 years imprisonment with a non-parole-period of 6 years;

7th Appellant – 9 years imprisonment with a non-parole period of 6 years;

8th Appellant – 9 years imprisonment with a non-parole period of 6 years;

9th Appellant – 7 years imprisonment with a non-parole period of 4 years.

[6] The prosecution case was that both Soko and Boila had been anally penetrated with a stick and sexually assaulted with chillies after they had been arrested and that all Appellant had been present at the hillside at Malevu when Soko and Boila were abused.

[7] At the close of the prosecution case, the Defence made a submission of no case to answer regarding which the learned trial Judge delivered a written Ruling that there was a case to answer.

[8] Thereupon the defence made an application for the learned trial Judge to recuse himself. This application was dismissed in a reasoned Ruling dated 7 November 2016.

[9] Prior to sentencing, the defence made an application pursuant to section 253(1) and (2) of the Criminal Procedure Decree which was rejected by the learned Trial Judge with costs against the Appellants and their Counsel by a reasoned Ruling dated 17 November 2016.

[10] A notice of appeal and application for leave to appeal against conviction was filed on behalf of the Appellant on 15th November 2016 setting out 37 grounds of appeal.

[11] An amended notice of appeal and application for leave to appeal against conviction and sentence was filed on behalf of the Appellant on 23rd November 2016 setting out 40 grounds of appeal.

[12] On 28th November 2016 an application for leave to appeal against conviction and sentence and application for bail pending appeal was filed on behalf of the Appellants with a supporting affidavit of the 1st Appellant on behalf of all the Appellants.

[13] The grounds set out in the notice of appeal are as follows:

> *"1. That the Learned Trial Judge erred in law and in fact in holding that the caution interviews of Accused 1, 2, 3, 5, 7 and 9 to be voluntary and admissible.*
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> *2. That the Learned Trial Judge erred in law and in fact in not reversing his ruling on the admissibility of the Caution interview of the 9th accused when during the trial proper where the prosecution witness was proved to have lied and the failure to do so caused a substantial miscarriage of justice.*
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> *3. That the Learned Trial Judge erred in law in not taking into adequate consideration the Appellant's submission on No Case to Answer at the end of the Prosecution case. Furthermore the Learned Trial Judge did not apply the relevant law to the facts in particular the evidence of Boila on oath who stated that 'none of the 9 accused persons assaulted him or Soko' that were presented by the State and further when the Prosecution stated that there was prima facie evidence that each of the accused had agreed with each other expressly or tacitly to sexually assault suspects for the purpose of interrogation.*
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> *4. That the Learned Trial Judge erred in law and in fact in not recusing himself after he failed to consider or take into consideration the submissions made by the Appellants' Counsel based on law, facts and evidence which was made to the Learned Trial Judge and who took only less than 5 minutes to rule against the appellants' application for recusal.*
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> *5. That the Learned Trial Judge erred in law and in fact in not taking into consideration the evidence of* ***Senijieli Boila*** *in respect of Counts 1 to 4 where he stated on oath as a victim he did not see any of the nine (9) accuseds either assaulted him or Soko and the failure to do so caused a substantial miscarriage of justice.*
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> *6. That the Learned Trial Judge erred in law and in fact in not taking into consideration that 2 versions of evidence were presented in court in respect of Count 5 and as such there was a doubt in the prosecution case. He rejected the evidence of Inspector Samisoni because he approved himself to be an interested witness vis-à-vis the defence. Such finding caused a substantial miscarriage of justice.*
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> *7. That the Learned Trial Judge erred in law and in fact in taking almost 3 hours to outline all the evidence in his*

summing up which was unfair, imbalanced, confusing and one sided and hence a substantial miscarriage of justice had occurred.

8. That the Learned Trial Judge erred in law and in fact in not adequately directing himself and the assessors that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellants.

9. That the Learned Trial Judge misdirected and/or wrongly directed himself on the question of burden of proof and by such failure there was a substantial miscarriage of justice.

10. That the Learned Trial Judge erred in law and in fact in not properly/and or adequately analyzing all the facts before him before he made a decision that the Appellants were guilty as charged on all the charges.

11. That the Learned Trial Judge erred in law and in fact in not directing himself to the possible defence on evidence and as such by his failure that was a substantial miscarriage of justice.

12. That the Learned Trial Judge erred in law and in fact in rejecting the evidence of Prosecution witness that were not favourable to the Prosecution but were favourable to the defence and as such there was a substantial miscarriage of justice.

13. That the Learned Trial Judge erred in law and in fact in failing to give proper weight to the evidence of Senijieli Boila who was the complainant in this case and as such ought to have dismissed Counts 1 to 4 against all the accused persons. Such failure to do so caused a substantial miscarriage of justice.

14. That the Learned Trial Judge erred in law and in fact in convicting the Appellants on circumstantial evidence and on inference drawn from the defence counsel not requesting the prosecution witnesses suggested that the Appellants had committed the offence.

15. That the Learned Trial Judge misdirected himself and contradicted himself in accordance with the directions given in his summing up when assessing the testimony of a witness.

16. That the Learned Trial Judge erred in law and in fact when he shifted the burden of proof to the Appellant when he stated 'Defence failed to create any doubt in the Prosecution Case.' And as such there has been a substantial miscarriage of justice.

17. That the Learned Trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors of Not Guilty did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the four assessors in light of the whole of the evidence presented in the trial.

18. That the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it.

19. That the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting/considering the Appellants case to the Prosecution and Defence evidence.

20. That the Learned Trial Judge erred in law and in fact by finding the Appellants guilty of the offences charged contradicted himself when he stated earlier that the credibility and the reliability was a question of fact for the assessors.

21. That the Learned Trial Judge erred in law and in fact when he misdirected himself on the laws regarding joint enterprise, common knowledge and aiding and abetting.

22. That the Learned Trial Judge erred in law and in fact when he misdirected himself as to the previous inconsistent statements of the prosecution witnesses.

23. That the Learned Trial Judge erred in law and in fact when he acted on inadmissible evidence in particular where he stated that he took into consideration submissions made by the prosecution only and as such there was a substantial miscarriage of justice.

24. That the Learned Trial Judge erred in law and in fact when he misdirected himself as to the number of police officers that were present which was 21 when the evidence before the court was between 25 to 30.

25. That the Learned Trial Judge erred in law and in fact when he misdirected himself not to believe prosecution witnesses whose evidence were favourable to defence.

26. That the Learned Trial Judge erred in law and in fact when he misdirected himself that none of the accused gave evidence to confirm the truth in his caution interview.

27. That the Learned Trial Judge erred in law and in fact when he misdirected himself that by failure to ask questions to Prosecution witnesses led him to believe that all the accused persons had committed the offence.

28. That the Learned Trial Judge erred in law and in fact when he completely misdirected himself on the law as to hostile witness.

29. That the Learned Trial Judge erred in law and in fact when he rejected all the prosecution witnesses whose evidence was favourable to defence.

30. That the Learned Trial Judge erred in law and in fact when he misdirected himself that there was no evidence of a black taxi that they were chasing because there were evidence from prosecution witnesses that there was a black taxi whom they suspected and on that basis they drove towards the feeder road on the hill side.

31. That the Learned Trial Judge erred in law and in fact when he created a theory that the police officer took the accused person to hilltop in order to torture them when there was no credible evidence to support his theory.

32. That the Learned Trial Judge erred in law and in fact when he misdirected himself in stating that there was evidence that Viliame, Filise and Pita assaulted Soko and Boila when another witness who was in the same vehicle told the court on oath no such think happened.

33. That the Learned Trial Judge erred in law and in fact when the learned trial Judge misdirected himself when he stated that none of the accused gave evidence on oath to confirm the truth in their statement.

34. That the Learned Trial Judge erred in law and in fact when the learned trial Judge misdirected himself when he found that all the accused told the truth in their statement when the law is very clear that the question of truth is for the assessors and not the judge. He made serious errors when he stated that he found all the accused's told the truth in their statement.

35. That the Learned Trial Judge erred in law and in fact in not exercising judicial discretion in awarding costs against the appellants and their counsel and as such there was a substantial miscarriage of justice.

36. That the Learned Trial Judge erred in law and in fact in not directing himself and the assessors adequately that the allegations and the charges before the court were never put to the accused persons while they were caution interviewed and as such there was a substantial miscarriage of justice.

37. That the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that the prosecution did not call evidence whereby in the charge statement all the accused had stated that all the statements given were not voluntary and/or they were promised to be state witnesses and further they denied all the allegations.

Appeal Against Sentence

38. That the Appellant relies on Grounds 1 to 37 stated hereinabove.

39. That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellants and not taking into relevant consideration.

40. That the Learned Trial Judge erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellants."

[14] Written submission were filed on behalf of the Appellants and the Respondent.

[15] Of the said grounds both parties have agreed that ground 3 is a question of law and that no leave is required to appeal to the Full Court of the Court of Appeal. **Verma v State** [2015] FJSC29; CAV0019.2014 (23 October 2015). Therefore in any event this appeal has to go before the Full Court for argument.

[16] Regarding the other grounds of appeal, they are varied and deal with almost all the steps which transpired at the trial, namely the voir dire inquiry, Ruling on no case to Answer,

Ruling on recusal, ruling regarding costs on Appellants and their Counsel, the evidence led at the trial, the summing up, burden of proof, standard of proof, the judgment of the learned trial Judge and sentence.

[17] When there are so many grounds of appeal set out in a notice of appeal, specially covering all aspects of the trial, it would be necessary to consider the totality of the evidence and the proceedings to consider granting of leave.

[18] As the above grounds of appeal against conviction except ground 3 involve questions of mixed fact and law or questions of fact alone, leave is required under section 21(1)(b) of the Court of Appeal Act, 2012. Any ground of appeal against sentence requires Court's leave pursuant to section 21(1)(c) of the Act. The test for granting leave against conviction is whether any ground of appeal raises a properly arguable point that is worthy of consideration of the Court of Appeal. The test for granting leave to appeal against sentence is whether the Appellant has established a arguable error in the exercise of the sentencing discretion of the learned trial Judge. **Dutt v State** [2016] FJCA 43; AAU36.2015 (27 January 2016).

[19] The Respondent has taken up the position, except for ground 3 that the grounds of appeal set out on behalf of the Appellants as grounds 10, 11, 12, 15, 19, 21, 22, 25, 29 are not arguable by virtue of inherent vagueness and lack of particularity. Regarding the other grounds of appeal the Respondent takes up the position that they lack merit and hence not arguable. As observed above, at this stage it is difficult to discern the necessary basis that would make these grounds arguable as the full proceedings and evidence are not available.

[20] In the above circumstances it would be appropriate to adopt the approach of Marshall J in **Singh v State** [2010] FJCA 53; AAU0083.2010 (16 December 2010) when he stated:

> *"In respect of conviction I must not make any decisions on the appeal but if I find that proposed grounds of appeal are properly arguable (as opposed to barely arguable and not arguable) the application meets the threshold for leave. Once the threshold is reached, my view is that the appellant should be free to advance arguments in the Court of Appeal without*

> *attempting to restrict him on the basis that leave is granted only in respect of some but not all grounds of appeal. The Court of Appeal is in my opinion well able to sort out "the wheat from the chaff" when it comes to focusing on what are more or less and non arguable grounds of appeal."*

[21] At the trial 23 witnesses gave evidence including the victim Boila who was treated as a hostile witness. The caution interview statements of the Appellants were led in evidence. The evidence of other Police Officers who were said to have been present at the scene where the abuses had taken place were among the witnesses who gave evidence.

[22] The Appellants in their grounds of appeal take up the position regarding the inadequacy of evidence to prove the charges against the Appellants and the directions of the learned trial Judge regarding burden of proof which could be considered as being arguable. In support of those grounds, portions of the evidence led at the trial have been set out in the written submissions.

[23] In general the submissions on behalf of the Appellants are based on misdirections and errors of law of the learned trial Judge. To consider such grounds adequately it would be necessary to have the entirety of the evidence and the proceedings and it would therefore be appropriate to grant leave to appeal against conviction so that the full Court of the Court of Appeal could consider same.

[24] As regards the grounds of appeal 38 to 40 against sentence, they deal with the position that there has been a disparity in the sentences handed down to the Appellants, that mitigating factors had not been given adequate consideration and that the provisions of the Sentencing and Penalties Decree 2009 have not been considered by the learned trial Judge when sentencing the Appellants. Further these grounds are tied up with the grounds relating to conviction. In those circumstances I would consider them to be properly arguable and I would grant leave.

Ruling on Bail

[25] In the application for bail pending appeal the Appellant has sworn an affidavit on behalf of himself and the other Appellants setting out the grounds in support of the application. The Respondent has stated that they are not filing any counter affidavits but has made a submission that the grounds set out in the application for bail do not come within the category of exceptional cases for granting bail.

[26] The first Appellant has set down matters relating to the positions they held, their family status and circumstances, that they are not flight risks, that their appeal has merits and that there is a high likelihood of success. That they are witnesses in several pending cases in Courts on behalf of the prosecution, that by the time their appeal is taken up for hearing by the Full court they would have served a substantial portion of their sentence and that the grounds of appeal have raised exceptional circumstances.

[27] Section 17(3) of the Bail Act 2002 provides as follows:

> *"17(3) 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 applicant when the appeal is heard."*

[28] Subsection 17(3) (a) of the Bail Act, 2002 has been interpreted to mean that the appeal should be one which is "highly likely to succeed".

[29] Unlike in the case of an accused applying for bail pending trial where the general presumption of bail is applicable, an Appellant after conviction has to meet the high threshold of showing that his appeal is highly likely to succeed in appeal. I would restate this position by referring to my Ruling in **Monika Arora v. State** CR App. AAU0001 of

2012 where I have cited the dictum of His Lordship Sir Moti Tikaram in **Amina Koya v. State** Cr App. No.AAU11/96:

> *"I have borne in mind the fundamental difference between a bail applicant waiting trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It therefore follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal."*

[30] In the often cited case regarding applications for bail pending appeal, **Ratu Jope Seniloli & Others v. The State** Cr. App. No.AAU0041/04S) the aspect of "likelihood of success" was interpreted as follows:

> *"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 a single Judge on the application for bail pending appeal to delve into the actual merits of the appeal."*

[31] In **Qurai v. The State** [2012] FJCA 61 it was stated that:

> *"I consider that the long standing requirement that bail pending appeal will only be granted in exceptional circumstance is the reason why "the chances of the appeal succeeding" under section 17(3) has been interpreted by the Courts so as to mean a "very high likelihood of success".*
>
> *"... 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...."*

[32] Her ladyship Madam Justice Scutt in **Matai v. The State** (2008) FJCA 89 has summarized the application of the law to the cases over the years. However, in that case having considered all the authorities and the grounds seeking bail, bail pending appeal was not granted to the Appellant. The submission on behalf of the Appellant that bail has been granted in several cases, which I do not wish to repeat, where charges of different types had been brought against Appellants do not necessarily mean that bail can be granted where there is an appeal . Each case has to be determined according to the circumstances of the case and in the cases cited in the written submissions filed on behalf of the Appellant, Court had been satisfied that the threshold that was required was met and very often such cases were those where the sentences were of a shorter duration.

[33] The grounds of appeal urged in the application for leave to appeal, except ground 3 which is a question of law, contain questions of mixed law and fact. A majority of them were based on the summing up of the trial Judge to the Assessors. Appellant's Counsel has reiterated the same arguments regarding insufficient evidence, contradictory statements, inadequate summing up of the trial Judge to the Assessors, misdirections and errors of law. Those are questions which could be considered by a full court of the Court of Appeal when the appeal is heard.

[34] 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:

> *"[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 ... ."*

[35] The grounds urged in the leave to appeal application certainly are arguable but in my view they do not meet the threshold of being highly likely to succeed. If they do not meet that threshold which is thus not satisfying S.17(3)(a) the question arises as to whether the

other grounds urged by the Appellant regarding the period of the sentence served by the time the appeal is heard should be considered.

[36] In Ratu Jope Seniloli's case (supra) it was stated that if section 17(3)(a) is not satisfied the grounds relating to S17(b) and (c) are otiose. However, I wish to consider the other grounds set out in the application for bail of the Appellant to see whether the application of the Appellant would come within exceptional circumstances.

[37] Section 17(b) deals with the period of sentence. The period of the sentence served by the time the appeal is heard has been considered in similar cases before this Court. In the Ruling in **Mahendra Motibhai Patel and Tevita Peni Mau v. The State** Cr. App. No.AAU0039 and Cr. App. No.AAU040, the Appellants had been sentenced to 12 months and 9 months respectively, and it was likely that about half that period would have been served by the Appellant when their appeals were likely to be heard. Justice Marshall's ruling stated that it was not a case where the chances of success were high and that taking into account section 17(3) (a), (b) and (c) that his decision was that there should not be bail pending appeal.

[38] In the present instance as I have taken the view that the appeal though arguable does not reach the threshold of being highly likely to succeed, the matters referring to the period of the sentence likely to be served up to the hearing of the appeal does not take the application any further.

[39] In the above circumstances my ruling is that the Appellants' application for bail pending appeal does not meet the requirements of the threshold set by section 17(3) (a) and therefore the application for bail pending appeal is refused.

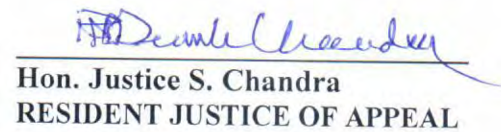
[40] In view of the fact that the Appellants are necessary witnesses for the prosecution in several pending cases it would be appropriate to have the Appellants' appeal heard at the earliest possible session of the full Court of the Court of Appeal.

Orders of Court

(a) *The application of the Appellants seeking leave to appeal against conviction and sentence is granted.*

(b) *The application for bail pending appeal is refused.*

(c) *The Appeal to be taken up for hearing at the earliest possible session of the Court of Appeal.*



Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL