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

CRIMINAL APPEAL NO. AAU 25 of 2018
(High Court Action No. HAC 417 of 2016)

BETWEEN : **GOVIND SAMI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr D P Sharma with Mr S Deo for the Appellant**
Mr A Jack for the Respondent

Date of Hearing : **23 September, 2019**

Date of Ruling : **13 December, 2019**

RULING

[1] The Appellant was convicted after trial on two charges of rape and one charge of indecently annoying a person.

[2] On 1 March 2018 he was sentenced to 9 years imprisonment with a non-parole period of 8 years.

[3] The Appellant filed a timely appeal against conviction and sentence. The grounds of appeal are as follows:

> *"1. That the learned Trial Judge erred in face and in law when in his Summing Up in the following areas:*
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> *[i] Failing to provide a corroboration warning to the assessors in that the complainant did not make a recent complaint or obtain a medical report at the material time to suggest that there had been any sort of forceful penetration of the complainant's vagina or bruising to show that she had been forcefully held by the Accused.*
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> *[ii] Failing to direct the assessors to the evidence that the complainant had shown a propensity towards extreme violence towards men who made her angry and that she had a DVRO against her at the material time for violence*
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> *[iii] Failing to direct the Assessors on the behavior of the complainant after the alleged incident where she drank grog for the evening with the accused and others.*
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> *[iii] Failing to properly direct the assessors on the implications of the alleged attempt to extort monies from the accused.*
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> *[v] At paragraph 37 of the Summing Up the learned Judge told the assessors that if they found the complainant's evidence they had to find the accused guilty as charge on all counts when in fact the proper test was whether the Prosecution had adduced sufficient evidence to prove each element of the offences beyond a reasonable doubt.*
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> *2. That the learned Judge erred in fact and in law when at paragraph 6 of the Judgment he held that the complainant provided credible evidence.*

3. *That the learned Judge erred in fact and in law in directly conversing with the complainant in the iTaukei language when the language of the Court should be English thereby causing substantial prejudice to the Accused and his Trial Counsel who were not conversant in the iTaukei language.*

4. *That the learned Judge erred in law when he failed to properly analyse the evidence in order to show that the accused knew that the complainant was not consenting to sex.*

5. *That the learned Judge erred in fact and in law when he failed to properly consider whether there was sufficient evidence to show that the accused intended to insult the modesty of the complainant having regard to all the relevant facts and evidence of the case.*

6. *That the learned Judge erred in fact and in law in failing to uphold the trial Counsel's submission that a conviction would be unsafe in light of the fact that the complainant and her defacto husband had sought to extort money from the accused, and erred in fact and law in failing to given weight to the evidence before the Court by DW1 by dismissing the extortion allegation on the basis that a criminal charge of rape could not be withdrawn in such manner.*

7. *That the accused was not given proper legal advice about his rights and options and there was ineffective assistance from trial counsel on various aspects of the trial including the failure to render proper legal advice and obtain informed consent about giving evidence under oath.*

8. *That the learned Judge erred in fact and law in imposing a sentence which was manifestly harsh and oppressive having regard to all the factor an allegation of power imbalance between the accused and the complainant which was not corroborated in any way and which was refuted in cross examination by virtue of the fact that:*

    i. *The Complainant was not related to the Accused;*

    ii. *The Complainant was not an employee of the Accused;*

    iii. *The Complainant was not bound to stay at the Accused's farm.*

9. *That the learned Judge erred in fact and in law in failing to analyse and give due regard to all the factors set out in the sentencing guidelines under the Sentencing and Penalties Act when sentencing the Accused.*

10. *That the said Trial constituted a mistrial when the Prosecution failed and refused to call a witness who had given a statement to the Police i.e. Anasa Nalagi and even though the Prosecution were put on notice to produce this witness.*

11. *That the learned Judge failed to give due regard to all the factors set out in the sentencing guidelines under the Sentencing and Penalties Act when imposing a non-parole period of 8 years.*

12. *That the Appellant reserves its right to file further grounds of appeal after preparation of the Court Record."*

[4] The Appellant has also filed an application for bail pending appeal.

[5] The Appellant owned a farm where he had a farm house which had two bedrooms, a bathroom, a kitchen and a warehouse. The Appellant had hired the complainant's husband as the caretaker of the farm house and he also worked in the farm. The complainant and her husband had occupied one of the bedrooms in the farm house and the bigger room was occupied by the Appellant when he was at the farm. The Appellant had paid everything for the upkeep of the farm house. The two charges of rape related to incidents that had occurred in July 2014 and 25th October 2016. The Third charge related to an incident on 29th October when the Appellant visited the farm house. These incidents had occurred when the Appellant had visited the farm house and when the complainant's husband had been out of the house and working in the farm. The prosecution case rested on the evidence of the complainant. The Respondent did not give evidence but called witnesses regarding an allegation of extortion by the complainant's husband.

[6] Both parties filed extensive written submissions regarding the grounds of appeal. The Respondent in the written submissions filed, acknowledged that Ground 1(i), Ground 2 and Ground 5 were questions of law. However, it has been submitted by the Respondent, that they are without merit.

[7] Since no leave is required on questions of law Ground 1 (i), 2 and 5 are questions that can be dealt with by the Full Court of the Court of Appeal.

[8] Regarding Ground 1(ii), it has been submitted that there had been a DVRO which indicated that the complainant had a propensity towards extreme violence and that the

learned Judge should have directed on the existence of the DVRO. The Respondent has taken up the position that there was no DVRO before the Court. Since it is not clear from the summing up and the judgment whether there was a DVRO presented to Court during the trial it may be necessary to look at the entire case record which is not possible at this stage. Therefore I leave this matter for the consideration of the Full Court.

[9] Regarding Ground 1(iii) the submission was made on behalf of the Appellant that on the day of the first incident that the complainant had drunk grog with the appellant and others and that had not been mentioned by the learned Trial Judge in his summing up. The Respondent in the submissions filed refers to the evidence of the complainant to submit that such allegation was denied by the complainant in cross-examination and therefore that matter was not a significant matter to be mentioned in the summing up. Here again it would be necessary to look at the evidence of the complainant to consider this ground of appeal and I will leave this ground too to be considered by the Full Court of the Court of Appeal.

[10] Ground 1(iv) related to the allegation of extortion by the complainant's husband on the Appellant which the learned trial Judge had commented on in his summing up.

[11] It may be necessary to consider the evidence that was led by the defence to consider whether the comments made by the learned Trial Judge were detrimental to the defence and therefore this matter too is left to the Full Court for consideration.

[12] Ground 1(v) was in respect of burden of proof. Having considered the summing up of the learned trial Judge it is seen that the learned Judge had adequately dealt with burden of proof in paragraphs 9 to 16, 37 and 42 and therefore this ground is not arguable.

[13] Ground 3 is as regards the learned Trial Judge speaking to the complainant in the i-Taukei language when she was giving evidence at the trial.

[14] It appears that the Appellant and his Counsel did not understand the i-Taukei language. The learned Judge would have got the relevant conversation he had with the complainant recorded so that the Appellant and his Counsel would have known how the conversation went. To consider whether such conversation was prejudicial or not it would be necessary

to look at the transcript of evidence and therefore I would leave the consideration of this ground also to the Full Court.

[15] Ground 4 refers to the fact that the learned Trial Judge had failed to properly analyse the evidence in order to show that the Appellant knew that the complainant was not consenting to sex.

[16] The Appellant had chosen not to give evidence at the close of the prosecution case. Therefore the question of whether he knew that the complainant was not consenting to have sex had to be determined by considering the evidence of the complainant.

[17] It was submitted on behalf of the Respondent that the complainant asking the Appellant when he was having sex with her to stop and that her position that she did not consent to have sex would infer that the she was not consenting and therefore the Appellant would have known that she was not consenting.

[18] In his summing up the learned trial Judge in analyzing the evidence of the complainant had stated that the prosecution version was that the Appellant knew that the complainant was not consenting to sex, and had left it to the Assessors to decide whether the prosecution had established its case.

[19] In the Appellant's submission it has been stated that the learned Trial Judge in his sentencing judgment had referred to the fact that the Appellant knew that she was not consenting to sex at the time. This was a statement made by the learned trial Judge after the judgment was pronounced where he concurred with the opinion of guilt brought in by the Assessors. Since the learned trial Judge had left the matter open to the Assessors to decide when he gave his summing up, I do not consider this ground to be arguable.

[20] The 6th ground of appeal is regarding the allegation of extortion by the complainant's husband which was revealed to court by the witness as summoned by the Appellant.

[21] The learned trial Judge had referred to this matter and stated that a criminal charge cannot be withdrawn in the manner indicated by the witness who had stated that if the money demanded was to be given so that the charges would be dropped. That such a charge can only be cancelled by the Director of Public Prosecution and no other.

[22] The submission is made on behalf of the Appellant that the learned trial Judge by stating so had discarded such evidence as being irrelevant which would have been prejudicial to the defence case.

[23] Here again it may be necessary to consider the entirety of the evidence on this matter given by the complainant and the defence witnesses and I would consider this ground to be arguable.

[24] Ground 7 is regards the advice of Counsel who appeared and conducted the trial for the Appellant not being proper.

[25] The manner in which a Counsel conducts his case is a matter entirely to be decided by him and different Counsel may adopt different strategies when conducting their case. Counsel appearing for the Appellant at the trial may have adopted the manner in which he conducted the defence of the Appellant which he thought was best for his client.

[26] It would be very easy for a client to say that he was not properly advised by his Counsel after things have gone against him. That by itself cannot be considered as a ground of appeal. In **Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008) the Supreme Court stated *"in general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice."*

[27] This ground is not arguable.

[28] For the grounds of appeal against sentence to be arguable it is necessary that it has to be shown that the learned sentencing Judge had erred in handing out the sentence, and should satisfy the principles set out in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), namely whether the sentence is wrong in law. The errors to be considered are whether the trial Judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, and failed to take into account some relevant consideration.

[29] The 8th ground of appeal which is against sentence is to the effect that the learned trial Judge had considered the power imbalance between the complainant and the Appellant as an aggravating feature.

[30] It was in evidence that the complainant's husband was employed by the Appellant who had provided a house for them to occupy and paid for the upkeep of the house. In such an instance it is difficult to see them of equal capacity and I do not consider that the learned trial Judge to have erred in considering this factor as an aggravating factor.

[31] Grounds 9 and 11 relate to the failure of the learned Judge in following the guidelines regarding the provisions of the Sentencing and Penalties Act.

[32] The learned trial Judge had in his sentencing judgment applied the proper tariff and had selected a starting point for his sentencing at a lower end and considered the aggravating and mitigating factors in arriving at the final sentence of 9 years and subjecting it to a non-parole period of 8 years. I do not see any error in the sentencing exercise. This ground is not arguable.

[33] Ground 10 refers to the failure to summon a witness who had given a statement to the Police and even though the prosecution was put on notice to produce this witness.

[34] The prosecution decides on the witnesses on whom they are relying on to establish their case and if the defence wishes to ensure a witness's attendance in court, the defence has to take steps to ensure that. If the defence had failed to take necessary steps to have such a witness attending court, it is their fault and cannot be considered as an occasion of a mistrial. This ground is not arguable.

Application for bail pending appeal

[36] The application for bail pending appeal has been supported by an affidavit and a supplementary affidavit sworn by the Appellant. The Respondent has merely filed a document stating that bail pending appeal is opposed.

[37] In the first affidavit deposed to by the Appellant he has set out matters relating to his health and has annexed certain medical certificates which have been issued in 2015 and do not relate to his present condition.

[38] In the supplementary affidavit matters that have been deposed are regarding his business matters and that in respect of some of them action has been taken against them by parties who have had dealings with him.

[39] In **Balaggan v The State** (unreported AAU 48 of 2012; 3 December 2012) Justice Calanchini AP (as he then was) set out the principles relating to the grant of bail pending appeal:

> *"[4] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in section 33(2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of the courts in this jurisdiction and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act. (the Act).*
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> *[5]. The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Act, the presumption in favour of granting bail is displaced.*
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> *[6]. Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"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:*
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> > *(a) the likelihood of success in the appeal;*
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> > *(b) the likely time before the appeal hearing;*
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> > *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*
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> *[7]. Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v-***

R *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

> *"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."*

[8]. The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

[9]. This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

> *"The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for bail pending appeal to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[40] Although grounds 1(i),2 and 5 do not require leave being questions of law, and some of the grounds of appeal have been ruled as being arguable, I am not satisfied that any of the grounds of appeal against conviction or sentence have a very high likelihood of success and as a result do not amount to exceptional circumstances.

[41] The matters referred to in his affidavits such as his health condition regarding which there are no recent reports, and his business and family matters being at stake as a result of

incarceration are not exceptional circumstances, specially when the appellant has failed to satisfy the threshold of a very high likelihood of success in appeal.

[42] Appellant's Counsel has stated in his written submissions that since his leave to appeal has been taken up for hearing that the Appellant will now hopefully have his appeal heard within the next twelve months or so, which is a possibility, if the Appellant takes the necessary steps in time.

[43] Having considered the affidavit of the Appellant, the written submissions filed on his behalf and the grounds of appeal against conviction and sentence, the application for bail pending appeal is refused for the reasons stated above.

Orders of Court

(1) Grounds 1(i), 2 and 5 being questions of law do not require leave.

(2) Leave to appeal is granted on grounds 1(ii), 1(iii), 1(iv), 3, 6 and 7.

***(3)** Application for bail pending appeal is refused.*

COURT OF APPEAL FIJI

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL