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

CRIMINAL APPEAL NO.AAU 038 of 2019
[High Court of Labasa Case No. HAC 48 of 2019]

BETWEEN : **EPELI LEALEAVONA**
Appellant

AND : **STATE**
Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 October 2020**

Date of Ruling : **09 October 2020**

RULING

[1] The appellant had been charged in the High Court of Labasa for having committed 'Obtaining Financial Advantage by Deception' contrary to section 318 of the Crimes Act, 2009 and committed rape contrary to section 217(1)(a) and (b) of the Crimes Act, 2009. The charges were as follows.

'FIRST COUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION*: Contrary to section 318 of the Crimes Act 2009.*

Particulars of Offence

> ***EPELI LEALEAVONO**, on the 29th day of September, 2015 at Naqara, Taveuni in the Northern Division, dishonestly obtained $500.00 from **S.D** by deceiving the said **S.D**.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

> ***EPELI LEALEAVONO**, on the 30th day of September, 2015 at Mua, Taveuni in the Northern Division, penetrated the vagina of **S.D** with his penis, without her consent.*

[2] After the summing-up at the trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion on 12 December 2017 that the appellant was guilty of the second count of rape and the majority of assessors had expressed the opinion that the appellant was guilty of the first count as well. On the same day, the Learned High Court Judge had agreed with the assessors and convicted the appellant of both counts and sentenced him on 13 December 2017 to 12 months imprisonment on the first count and 14 years of imprisonment with a non-parole period of 13 years (his sentences to run from the day of his arrest); both sentences to run concurrently.

[3] The appellant had handed over an untimely appeal on 11 March 2019 against conviction and sentence to the Resident Magistrate of Lautoka during his visit to Natabua Correctional Centre. Thus, the appellant's appeal is late by about 01 year and 02 months. He had tendered amended grounds of appeal, an application for bail pending appeal accompanied by two affidavits on 09 July 2020. He had also filed an application for enlargement of time supported by an affidavit on 06 August 2020. His written submissions on all applications had been tendered on 19 August 2020. The State had tendered its written submissions on 17 September 2020 *inter alia* conceding that this was a fit case to allow the appellant to appeal and grant him bail pending appeal as well.

[4] The facts as narrated in the sentencing order are briefly as follows.

> *2. The brief facts of the case were as follows. Prior to 29 September 2015, you and the complainant (PW1) knew each other. She was a businesswoman running a shop in Taveuni, and she was buying and selling grog to customers. You sold yaqona to her, which she later sold to others. This commercial relationship had been in existence for months, prior to the offending. On 29 September 2015, you asked for a $500 cash advance, in exchange for supplying grog to PW1 on the same day.*
>
> *3. PW1 advanced you $500 cash on 29 September 2015, but you failed to provide her with the grog that day. On 30 September 2015, PW1 again asked you to provide her with her $500 worth of grog. You told her the grog was still been processed in the bush. You later invited her to the bush to see her grog. You later took her to a secluded spot in the bush, near a tin house. You later threatened to kill her if she didn't do what you wanted. You later forced yourself on her by penetrating her vagina with your penis, without her consent. You knew she was not consenting to sex at the time.*

[5] Grounds of Appeal urged on behalf of the appellant:

> ***Conviction***
>
> *'<u>Ground 1</u> Whether the conviction entered against the Appellant should be set aside upon being satisfied that the Appellant's absence from the trial was from causes which the Appellant has control over?*
>
> *<u>Ground 2</u> Whether the trial in absentia of the Appellant on a charge is an indictable offence a procedural irregularity pursuant to Section 171 (1) (a) of the Criminal Procedure Act of 2009 resulting to a miscarriage of Justice?*
>
> *<u>Ground 3</u> That I did not receive a fair trial by reason of the failure of the prosecution (DPP) not informing the trial court that the Appellant was detained in custody on remand at the Lautoka Remand Centre in Criminal Case NO. HAC 161/24 of 2017.*
>
> *<u>Ground 4</u> That I did not receive a fair trial by reason of my trial conducted and held in my absence and total denial of the rules of natural justice of the opportunity to be heard before any decision is given.*
>
> ***Sentence***
>
> *Ground 5. That the sentence is harsh, excessive and passed on an error of law amounting to a miscarriage of justice.*

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> '*(a)……..*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.*

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[9] Sundaresh Menon JC also observed

'27……… It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[10] Under the third and fourth factors in ***Kumar*****,** test for enlargement of time now is **'real prospect of success'.** In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

Length of delay

[11] As already pointed out the delay is about 01 year and 02 months and therefore substantial and unacceptable.

Reason for the delay

[12] The appellant has stated that he was in remand from 24 August 2016 until being released on bail on 17 January 2017 but he was again remanded by Lautoka High Court on 27 June 2017 and bail was revoked. In the meantime the prosecution had applied to have his trial in his absence in the present case at Labasa High Court and the case had proceeded to trial on 11 December 2017 and concluded on 13 December 2017.

According to him, he had been informed of the outcome of his trial 05 July 2018 but no papers had been served on him. He had attempted to retrieve them through internet and settled his appeal papers.

[13] However he had not explained why he waited since July 2018 to March 2019 (08 months) to tender his appeal.

Merits of the appeal

[14] It is convenient to consider all grounds of appeal against conviction together. The gist of the appellant's complaint against conviction relates to the trial against him in absentia. His position is that he had not willingly evaded the trial but been detained in Lautoka Correction Centre in connection with HAC 161/16 in Lautoka High Court from 03 September 2016 to 23 August 2019 until he was acquitted after trial. He had also stated that whilst the trial against him in Labasa in HAC 048 of 2015LAB was being heard he was detained at Lautoka Correction Centre in connection with HAC 124 of 2017 in Lautoka High Court as well.

[15] On a perusal of the Order made by the trial judge in HAC 161 of 2016 in Lautoka High Court on 23 August 2019 it appears that upon filing a *nolle prosequi* by the DPP the appellant had been discharged. The judgment in HAC 124 of 2017 dated 17 May 2019 of Lautoka High Court reveals that the assessors had unanimously opined that the appellant was not guilty of both counts of rape and the trial judge had agreed with them and acquitted the appellant. The trial in HAC 124 of 2017 had taken place on 16 May 2019.

[16] The record of the Magistrates' court of Nadi in case no. 640 of 2017 shows that the appellant had been denied bail on 01 June 2016 and the case had been transferred to Lautoka High Court which had tried him under HAC 124 of 2017 and acquitted him on 17 May 2019.

[17] The record of the current case HAC 48 of 2015 shows that the appellant had been present before Labasa High Court on 11 December 2015 until 18 April 2016 and

pleaded not guilty to all charges. The ruling on bail pending trail dated 26 November 2015 in HAM 42 of 2015 shows that the appellant had been bailed out in HAC 48 of 2015 on 26 November 2015. Thus, the appellant had been on bail during this period.

[18] However, from 17 May 2016 he had been absent and a bench warrant had been issued. On 20 July 2017 the prosecution had applied to try the appellant in absentia and the learned trial judge had allowed the application taking his absence as a sign that he had chosen to attend and proceeded to try him in absentia in terms of section 14(2)(h)(i) of the Constitution on 11 and 12 December 2017 and sentenced on 13 December 2017.

[19] The available material does not reveal when the appellant had been arrested after being bailed out on 26 November 2015. He may have been arrested and detained before 17 May 2016. However, it appears that at least since 01 June 2016 until 17 May 2019 the appellant had been in remand in respect of HCA 124 of 2017 which means that when the trail was fixed to be taken up in his absence in HAC 48 of 2015 the appellant was in remand and unfortunately the state had made the application to try him in his absence whilst he was being detained in remand in respect of HCA 124 of 2017.

[20] The affidavit filed on behalf of the DPP while conceding that the appellant was in remand custody from 27 November 2017 to 18 January 2018, had stated that the fact of his being in remand had gone undetected due to a slight change in the appellant's name (Epeli Lealeavono) in its case management data base called CASES.

[21] The appellant argues that his rights under section 14(2)(h)(i) of the Constitution had been violated as a result of the trail against him in absentia. Section 14(2)(h)(i) is as follows.

> *'Every person charged with an offence has the right to be present when being tried, unless (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or (ii)…………'*

[22] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be

satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

[23] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trail while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.

[24] The common law sheds more light on this issue. It appears that even when an accused waives his right to be present the court is not necessarily bound by law to proceed with the trial without the accused. Discretion is vested in the trial judge to decide whether the accused should be tried in his absence or not. In **R v Abrahams** 21 VLR 343 where the appellants were present at the commencement of the trial but were absent at a later stage due to illness, Williams J said, at p 346:

> *'The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence.'*

[25] **Regina v Jones** (On Appeal From The Court of Appeal (Criminal Division) [2002] UKHL 5 Lord Hutton said

'23. I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.

24. The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.'

[26] The learned trial judge had been satisfied with the fulfillment of the conditions set out in section 14(2)(h)(i) of the Constitution and thereafter exercised his discretion in proceeding with the trial in the absence of the appellant. However, given the above factual scenario relating to his detention unknown to the prosecution and the trial judge, the judge at the instance of the prosecution had proceeded on a wrong factual basis (of course, due to no fault on his part) to tray the appellant in his absence.

[27] The following paragraphs in the summing-up deal with the trial without the appellant.

'9. In a pre-trial conference on 18 February 2016, in his presence, the prosecution and the accused agreed for a trial from 26 to 30 September 2016. On 23 October 2015, he waived his right to counsel and choose to represent himself. He was warned on 18 February 2016 that if he absconded from trial, he will be tried in absentia in accordance with the law stated in paragraph 8 hereof. He was then released on bail.

10. On 17 May 2016, the accused failed to appear in court. He had not appeared in court ever since. He was aware of the present court proceeding, but by his conduct, has chosen not to attend. In the meantime, the court trial date had been amended to start from yesterday. Because of the above, the prosecution applied for the accused to be tried in absentia on 20 July 2017. Although the prosecution's application was granted, the court hoped he would turn up yesterday, so that the trial would proceed in his presence.'

[28] Therefore, if the appellant's complaint can be sustained with more precise detail regarding the periods of his detention at a hearing before the full court, there is a real prospect of his succeeding in his appeal and being granted an opportunity to face a new trial. The respondent too does not object to leave to appeal being granted against conviction. However, if the appellant's position is not borne out by the copy record, he will have to advise himself as to place more material before the full court to substantiate

his contention. The respondent too is advised to verify the appellant's claims of having been in remand before and after the trial and not having had notice of the trial in order to assist the full court at the hearing of the appeal.

[29] In view of my above decision on conviction appeal, I consider it unnecessary to consider the ground of appeal against sentence.

Prejudice to the respondent

[30] More than 05 years have lapsed since the commission of the offence. There will be some degree of inconvenience caused to the complainant who will have to give evidence again, for no fault of hers, if a new trial is ordered. No prejudice could be anticipated to the prosecution. However, the fundamental prejudice and miscarriage caused to the appellant as a result of the trial in absentia far outweighs all other factors. Strong merits of his appeal overshadow the substantial delay, not so convincing reasons for the delay and relative inconvenience to the complainant.

[31] Thus, enlargement of time to appeal against conviction is granted to the appellant on the ground whether a miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia.

Law on bail pending appeal

[32] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

'[5] There is also before the Court an application for ***bail pending appeal*** *pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant* ***bail pending appeal*** *may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

[6] In ***Zhong –v- The State*** *(AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of* ***bail pending appeal****. It is appropriate to repeat those observations in this ruling:*

*"[25] 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 this court 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.*

*[26] 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 Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

[27] 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:

> *"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 appellant when the appeal is heard."*

*[28] 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."

[29] 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.*

[30] 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."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[33] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***)*** the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[34] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[35] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[36] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[37] In ***Qurai*** it was stated that:

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

[38] 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 [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[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 ... ."*

[39] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting **bail pending appeal** as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional*

circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."

[40] Therefore, the legal position is 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. A very high likelihood of success of the appeal would be deemed to satisfy the requirement of exceptional circumstances. However, an appellant can rely only on 'exceptional circumstances' including extremely adverse personal circumstances even when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[41] 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.

[42] 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'.

[43] On the basis of what I have discussed above, I determine that the appellant also has a very high likelihood of success in his conviction appeal. Therefore, the appellant is entitled to be bailed out pending appeal.

Order

1. Enlargement of time to appeal against conviction is allowed.
2. Bail pending appeal is granted subject to the following conditions.

(i) The appellant shall reside at 56 Namena Road, Nabua.

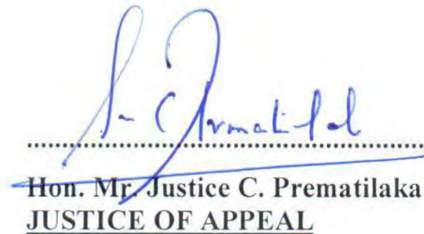
(ii) The appellant shall report to Nabua Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

(iii) The appellant shall attend the Court of Appeal when noticed on a date and time assigned by the registry of the Court of Appeal.

(iv) The appellant shall provide in the persons of Enesi Turogo Rogovakalali (brother/date of birth – 15 November 1968 & Driving Licence No. 656112) of 289 Waimanu Road, Suva City and Paula Waqairapoa (brother/ date of birth – 28 April 1966 & Passport No.604128) of 56 Namena Road, Nabua to stand separately and jointly as sureties.

(v) Appellant shall be released on bail pending appeal upon condition (iv) above being complied with.

(vi) Appellant shall not reoffend while on bail.



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL