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

CRIMINAL APPEAL NO.AAU 030 of 2018
[In the High Court at Labasa Case No. HAC 18 of 2017]

BETWEEN	:	**JALE RAVULA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Ms. S. Ratu for the Appellant**	
	:	**Mr. M. Vosawale for the Respondent**	
Date of Hearing	:	**21 December 2020**	
Date of Ruling	:	**22 December 2020**	

RULING

[1] The appellant, aged 75, had been indicted in the High Court of Labasa on a single count of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009, committed at Nawaca Village in Bua, in the Northern Division . The victim was 05 years old at the time of the offence.

[2] The information read as follows.

COUNT 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

Particulars of Offence

> *JALE RAVULA, on the 5th day of April 2017, at Nawaca Village in Bua, in the Northern Division, penetrated the vulva of **LDU**, a child under the age of 13 years, with his lips.*

[3] At the conclusion of the summing-up on 01 March 2018 the assessors' opinion had been unanimous that the appellant was guilty of the charge of rape against him. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted and on 02 March 2018 sentenced him to 11 years and 11½ months of imprisonment with a non-parole period of 07 years and 11½ months.

[4] The appellant had filed a slightly untimely notice of appeal/ application for leave to appeal on 06 April 2018 against conviction. He had tendered amended/additional grounds of appeal on conviction and sentence on 19 August 2020. Thereafter, the Legal Aid Commission on his behalf had filed an amended notice of appeal against conviction, bail pending appeal application and written submissions on 28 September 2020. The state had tendered its written submissions on 27 October 2020. The appellant in the meantime had expressed his wish to abandon the sentence appeal and accordingly he had filed an abandonment notice on 07 September 2020 in Form 3 on his sentence appeal.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173. **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The two grounds of appeal urged on behalf of the appellant against conviction are as follows.

'Ground 1

The Learned Trial Judge had erred in law and in facts in directing the assessors on the agreed facts, that is not done in a fair and balanced manner, to the appellant's case

Ground 2

The Learned Trial Judge had erred in law and in facts by allowing the prosecution to seek the opinion of the medical doctor in explaining what is meant by the complainant stating 'that the accused drank her pipi' which explanation by the doctor is based on speculation and the doctor is not qualified as an expert to provide an explanation to such a statement by the complainant, therefore has caused a substantial miscarriage of justice.'

[7] The learned trial judge had summarized the evidence led by the prosecution and the defense in the summing-up as follows.

PROSECUTION CASE

'[13] The complainant testified that she is 5 years old.

[14] On the day of the incident, the accused had called her by waving at her. She had gone into the accused's house. She had taken out her shoes and gone to him. The accused had taken her to his room. There was no one else in the room at the time. The accused had then laid her down. He had then taken out her dress and trousers (her three quarter trousers). She said at that time she had not been wearing any clothes. The witness said "then he drink my pipi".

[15] When the complainant was asked what did the accused use to drink her pipi, she said he used his mouth. When asked to show what part (of the mouth) the witness demonstrated by showing her lips. When questioned as to whether the accused was drinking her pipi inside or outside, the witness said inside.

[16] When asked to show in what part of her body is her pipi, the witness clearly pointed towards the area of her groin.

[17] ***The complainant' mother, Tulia Rasoro****, testified that on 5 April 2017, she was at home. Around 4.00 in the evening she had been baking buns. At that time Seru (Seruwaia Vunibola) had come home. Her daughter had followed Seru. Seru had told the witness to ask her daughter what she was doing in the accused's room. When Tulia had asked her daughter as to what happened, initially she had not said anything. The witness had again asked*

her daughter what did she go and do in the accused's room. Her daughter had replied thus "Bu Jiale take out my dress and my trousers and drink my pipi (vagina)".

[18] *Tulia had immediately gone to the accused's house, together with the complainant, and confronted him. The accused had said that the complainant came and asked him if he can make one suki for her (meaning Fijian tobacco).*

ACCUSED'S CASE

*'**[24]** The accused is 76 years of age. He totally denies the allegation against him.*

[25] *He testified that on the day of the incident the complainant had come to his house around 10.00 in the morning. He had been sitting in his wife's room at the time. His grandson Tomasi has also been there. At that time his wife (who is suffering from paralysis for the past 9 years due to a stroke) had crawled out of the room. The witness said that his daughter-in-law Seruwaia (his son Viliame's wife) was also at home at the time.*

[26] *The accused testified that after that he was lying down on his bed while the two children, the complainant and Tomasi were playing in the room. He had told them to stop playing. The children had also been looking at the photos that were inside the room (photo album).*

[27] *Thereafter, Seruwaia had told the complainant to go out and the complainant had left.*

01st ground of appeal

[8] The appellant's complaint is based on paragraph 71 of the summing-up which is as follows.

> *'**[71]** In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved. Based on the said agreed facts the identity of the accused, the date of incident (5 April 2017), the place of incident (Nawaca Village in Bua), and the fact that the complainant is below 13 years are proved. The only element left for the prosecution to prove is that the accused penetrated the complainant's vulva, with his lips.'*

[9] The appellant argues that it was wrong for the trial judge to have referred to the identity of the appellant as an admitted fact. The agreed facts are stated in paragraph 58 of the summing-up.

[58] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "Admitted Facts" or "Agreed Facts" without placing necessary evidence to prove them:

> *1. **THAT** the Accused in this matter is **JALE RAVULA**.*
> *2. **THAT** the complainant in this matter is **LDU**, who is below the age of 13 years.*
> *3. **THAT** on the 5th day of April 2017, the complainant and the Accused was together in the bedroom of **JALE RAVULA** in the village of Nawaca in Bua.*
> *4. **THAT** the complainant calls the accused "Bu Jiale" meaning grand-father Jiale.*

[10] When an accused does not challenge the identity it does not mean that he admits the impugned criminal act. It is clear from the admitted facts and the appellant's evidence that what he was challenging was the act of orally penetrating the child victim's vagina and not the fact that he was inside the room with her at the relevant time. Therefore, for all intents and purposes the identity of the appellant was not contested.

[11] In **Rashid v State** [2020] FJCA 3; AAU003.2014 (27 February 2020) it was held by the Court of Appeal *inter alia* as follows.

> *'[24] In **The Queen v Raymon** [1956] NZL R (p 527 at 537):*
>
> > *"We think it proper to add that no infrequently in this Court a Judge's summing up is microscopically analysed in order to find some expression of phrase or some treatment of the evidence upon which to found an appeal against conviction. It must be but seldom that a summing up is without any imperfections, but it is not the function of this Court to consider weather this or that phrase was the best which might having chosen (R v. Immer, R v. Davies, (1917)13 Cr. App. R. 22, 25), or whether more or less stress should have been put on particular parts of the evidence but to determine broadly and generally whether in the summing up the case was fairly put before the jury and if the summing up has done that and all relevant issues have been left for decision by the jury, no objection can be taken to it."*
> >
> > *Also see Ravi Nand and Another v Reginam [1964] 10 FLR p.37 '...it has been frequently pointed out that the trial judge is under no obligation to explain in detail the case for the defence provided that his summing up as a whole is fair.*
>
> *[25] It is trite law that in considering the summing up the need is to take a holistic view of its contents and to determine whether there has been any*

misdirection or non-direction, the effect of which could have an impact on the final outcome of the trial.

[12] Therefore, there is no reasonable prospect of success of this appeal ground.

02nd ground of appeal

[13] The appellant takes exception to the doctor's evidence who was not an expert in explaining the meaning of the phrase 'the accused drank her pipi' as stated in paragraph 63(vii) of the summing-up

'[63] Evidence of Dr. Talei Vasuitaukei

(i) Currently she is serving as a Medical Officer at the Nabouwalu Hospital. She has been serving at the Nabouwalu Hospital from 2015 to date.

(ii) She conducted a medical examination on the complainant, on 6 April 2017.

(iii) However, in this case the prosecution was relying on the doctor's evidence not in relation to the medical examination conducted by her on the complainant, but to explain to court the structure of the female genitalia (external and internal genitalia of a female)........

(vii) When asked to explain in her opinion what the complainant meant when she said "the accused drank her pipi", the doctor stated that "If you translate the word drank it would amount to sucking. When we drink we open our mouth to drink from a cup. I think she described the act of sucking".

[14] It is not clear in what context the state had asked the doctor to explain what the victim had told. The state counsel submitted at the hearing that it was possible that the doctor was asked to explain on what the victim may have told him and recorded by him at the medical examination.

[15] The doctor may not have been an expert in attributing a meaning to what the victim had told him. Nevertheless, the mother of the victim whose evidence was led as recent complaint evidence by the prosecution had said in her evidence as follows.

'[61] Evidence of the Tulia Rasoro

(i) She testified that she is residing in Nawaca, Bua. She is married in Bua. Her husband's name is Jepeca Uru. They have one child together, the

complainant LDU. The complainant's date of birth is 5 March 2012. Therefore, she will be turning 6 years of age next Monday.

(ii) The witness testified that on 5 April 2017, she was at home at Nawaca Village. Around 4.00 in the evening she had been baking buns. At that time Seru (Seruwaia Vunibola) had come home. She is one of the ladies married in Nawaca. Her daughter had followed Seru. Seru had told the witness to ask her daughter what she was doing in Bu Jiale's room.

(iii) Then the witness had asked her daughter. Initially her daughter had not said anything. The witness had again asked her daughter what did you go and do in Bu Jiale's room. ***Her daughter had replied as follows; "Qai tukuna vei au o LDU ni o Bu Jiale e luvata na nona i vinivo kei na nona tarausese qai gunuva na nona pipi". Which means "Bu Jiale take out my dress and my trousers and drink my pipi (vagina)".***

[16] The victim's evidence on the same point is as follows.

'[62] Evidence of the complainant LDU

(i) The complainant stated that she is 5 years of age. Her mother's name is Tulia Rasoro and her father's name is Jepeca Ura. She has no brothers or sisters. She resides at Nawaca Village.
(ii) The witness testified that she knows Bu Jiale and also where Bu Jiale resides. Bu Jiale's house is near to her house.
(iii) The complainant testified that on the day of the incident, the accused had called her by waving at her. She had gone into Bu Jiale's house. She had taken out her shoes and gone to him. Bu Jiale had taken her to his room. There was no one else in the room at the time. The accused had then laid her down. He had then taken out her dress and trousers (her three quarter trousers). ***She said at that time she had not been wearing any clothes. The witness said "then he drink my pipi".***
(iv) When asked what did the accused use to drink her pipi, she said he used his mouth. When asked to show what part (of the mouth) the witness demonstrated by showing her lips.
(v) When asked to show in what part of her body is her pipi, the witness pointed towards her groin area.
(vi) When asked was he drinking your pipi inside or outside, the witness said inside.
(vii) Thereafter, the witness testified that Na Seru (aunt Seru) asked her to go away. Aunt Seru had been in her room at the time. Then she had gone home with Aunt Seru. The complainant had then told her mother of what happened (what the accused had done to her).
(viii) The witness clearly identified Bu Jiale as the accused in this case.

[17] Therefore, in the context of the evidence of the victim and her mother, the doctor's explanation which was similar to what the victim and her mother had already said in evidence cannot be said to have caused a miscarriage of justice.

[18] Therefore, there is no reasonable prospect of success in appeal as far as this ground of appeal is concerned.

Law on bail pending appeal.

[19] 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.*
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> *[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."*

[20] 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)

[21] 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.'*

[22] 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 fails 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).'

[23] 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'*

[24] 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…"*

[25] 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 … … ."*

[26] ***Ourai*** 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."*

[27] Therefore, the legal position appears to be 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. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[28] 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.

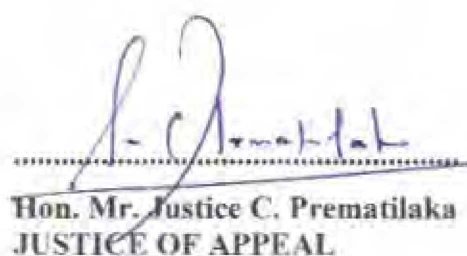
[29] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant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

[30] As I have already held the appellant does not have even a reasonable prospect of success in either of his appeal grounds. Therefore, he obviously does not have a 'very high likelihood of success'.

[31] Therefore, the appellant is not entitled to bail pending appeal.

Order

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL