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

CRIMINAL APPEAL NO.AAU 149 of 2017
[In the High Court at Suva Case No. HAC 223 of 2016]

BETWEEN	:	**SANAILA WAIKELIA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. S. Kiran for the Respondent**
Date of Hearing	:	**22 December 2020**
Date of Ruling	:	**23 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of rape contrary to section 207 (1) and (2) (b) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210(1)(a) of the Crimes Act, 2009 committed on 08 June 2016 at Galoa village, Navua in the Central Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

RAPE: *contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SANAILA WAIKELIA *on the 8th day of June 2016 at Galoa village, Navua in the Central Division penetrated the vagina of NE with his finger, without her consent.*

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: *contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SANAILA WAIKELIA *on the 8th day of June 2016 at Galoa village, Navua in the Central Division unlawfully and indecently assaulted NE by kissing her.*

[3] After the summing-up on 22 September 2017 the assessors had unanimously opined that the appellant was guilty of both charges and in the judgment delivered on 25 September 2017 the learned trial judge had disagreed with them on count 01 and agreed with them on count 02 and convicted the appellant for sexual assault on the first count and sexual assault as charged under the second count. On 27 September 2017 the appellant had been sentenced to 06 years and 10 months of imprisonment with a non-parole period of 05 years and 10 months.

[4] The appellant's notice of application for leave to appeal against conviction and sentence had been filed within time by the appellant on 25 October 2017. The Legal Aid Commission on 13 August 2020 had filed amended grounds of appeal, bail pending appeal application and written submissions. The appellant had filed an application to abandon his sentence appeal in Form 3 on the same day. The state had responded on 04 September 2020.

[5] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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 sole ground of appeal against conviction urged on behalf of the appellant is as follows.

> *(i) THE verdicts are unreasonable and cannot be supported by the evidence considering that the learned trial judge had believed the evidence of the second defence witness.*

[7] The trial judge had summarised the evidence in the judgment as follows.

> *5. The complainant's evidence was that the accused put his arms around her and kissed her on her lips, then forced her to sit on the bed by pushing her onto the bed while kissing her lips and having his arms around her. According to the complainant, then the accused sat on her right side and "put his right hand on her thigh through her shorts and her underwear into her vagina". The complainant said that it was quick and then the accused stood up to undo his pants. At this moment the second defence witness came inside the room to pack her bags.*
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> *6. The accused and the second defence witness also testified on what took place on 08th June 2016 inside the bedroom in question. According to the accused he was just sharing jokes and laughing with the complainant while they were inside the room. According to the second defence witness, she saw the complainant walk inside the bedroom and sit down on the bed and she said that she heard the complainant and the accused sharing jokes and laughing inside the room. She also saw the accused hugging the complainant. However, she was not paying attention to what was happening inside the room.*
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> *7. In my assessment, the second defence witness though related to the accused as her niece, was a credible witness. I believe her evidence. The accused on the other hand was evasive and his evidence was not credible and reliable.*

Sole ground of appeal

[8] The appellant submits that the learned trial judge had found the account of the complainant regarding the events leading up to the digital rape to be improbable and unreliable and therefore, the same should have been extended to the appellant's allegation of having kissed her and touching her vagina as well. He also argues that

because the trial judge had accepted DW2's evidence as believable it leads to the complainant's evidence also becoming unreliable on the said allegations against the appellant.

[9] The trial judge had stated at paragraph 8 as follows.

> *'8. Although the complainant was all in all a credible witness, I found her evidence that the accused forced her onto the bed having his arms around her and that she said 'no' and tried to push him away improbable and unreliable especially given the evidence of the second defence witness. If the complainant had opted to resist in the manner she described, in my view, she would have tried to escape the moment she had an opportunity and the second defence witness walking into the room was one such opportunity.*
>
> *9. However, I accept the complainant's evidence that the accused kissed her on her lips and put his right hand through her clothes without her consent. In my view, this is a case where the complainant did not physically resist though she did not freely and voluntarily consent for the accused to do what he did to her. I accept her evidence that she was shocked as this was something she never expected and because of that she did not know what to do or how to react. I am mindful of the fact that the complainant was a foreigner who had been in Fiji only for about four months all by herself when this incident took place. Her not shouting or calling for help is understandable due to the fact that she was in shock and it could reasonably be inferred that she may have had concerns as to whether she could trust anyone who was present at that time. I also accept the complainant's reasons for not complaining to anyone until the third day after the incident including to the third defence witness.'*

[10] It is difficult to reconcile how the trial judge had felt that the complainant's evidence on the accused having forced her onto the bed, having put his arms around her and her having said 'no' and tried to push him away was unreliable and improbable while at the same time holding that her evidence on the appellant having kissed her and putting his hand on the thigh through her shorts and underwear into the vagina to be acceptable.

[11] Further, if the trial judge had believed DW2's evidence her evidence that she saw the complainant walk inside the bedroom and sit down on the bed and heard the complainant and the accused sharing jokes and laughing inside the room also had to be accepted. She also saw the accused hugging the complainant.

[12] This evidence, while showing a consensual interaction between the complainant and the appellant, had not corroborated the complainant's evidence of the appellant having kissed her lips and putting his hand on the thigh through her shorts and underwear into the vagina. DW2 had not seen anything beyond what she had stated. This is quite possible as according to the complainant after DW2 came to the room to pack her bags none of the offending acts had happened. The complainant had further said that after DW2 had left the room the appellant had told her *'we will continue after I come back'* and both of them had then left the room. According to DW2 the complainant had left the room smiling and her deceased brother had been inside the room all the time which, of course, the complainant had denied.

[13] The trial judge seems to have had some grounds including medical evidence to acquit the appellant on the rape count and on the basis that the prosecution had supposedly failed to elicit evidence of penetration (see paragraph 12 and 13 of the judgment). Further, PW2' recent complaint evidence was that the complainant had told her that she *'was kissed and touched by her private part by the accused'*. Had the trial judge convicted the appellant on the lesser count of sexual assault on count 01 based on the complainant's rest of the evidence without stating that some evidence which is part and parcel of and inseparable from her total narrative unreliable and improbable, doubts could not have arisen as to her overall credibility.

[14] The appellant relies on the decision in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) in support of his argument.

[15] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *'.....Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based.....'*

[16] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[17] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[18] In view of the maters stated above and particularly the trial judge's assessment of part of the complainant's evidence as improbable and unreliable, though I cannot say the verdict was unreasonable or cannot be supported by evidence or whether the trial judge could have reasonably convicted the appellant on two acts of sexual assault on the evidence before him without the complete appeal record, I think the appellant deserves an opportunity to have his complaint examined by the full court. Therefore, leave to appeal should be granted on this ground of appeal.

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.*

*[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 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)."

[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] ***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."*

[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 explained above, I have decided to allow leave to appeal not because I conclude affirmatively at this stage that there is a reasonable prospect of success but because in view of the trial judge's finding of some parts of the complainant's evidence to be improbable and unreliable. Therefore, I cannot obviously say that the appellant's appeal has a 'very high likelihood of success'. Therefore, he is not entitled to bail pending appeal.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL