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

CRIMINAL APPEAL NO.AAU 108 of 2017
[High Court Suva Criminal Case No. HAC 327 of 2015S]

BETWEEN : **JONE RABUNO COKANAUTO**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. S. Valenitabua for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **04 June 2020**

Date of Ruling : **09 June 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on 04 counts of rape under the Penal Code, one count of rape under the Crimes Act, 2009, one count of attempted rape under the Penal Code and 04 counts of indecent assault under the Penal Code. The particulars of the offences were:

*'**COUNT ONE***

Statement of Offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of February 2005 to the 28th day of February 2005, at Taveuni in the Northern Division, had unlawful carnal knowledge of* ***U.D*** *without her consent.*

COUNT TWO

Statement of Offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of August 2005 to the 31st day of November 2005, at Nadera Nasinu in the Central Division had unlawful carnal knowledge of* ***U. D*** *without her consent.*

COUNT THREE

Statement of Offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of July 2006 to the 31st day of December 2006, at Taveuni in the Northern Division had unlawful carnal knowledge of* ***U. D*** *without her consent.*

COUNT FOUR

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 154(1) of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of January 2006 to the 31st day of July 2006, at Nadera, Nasinu in the Central Division unlawfully and indecently assaulted* ***F. N.***

COUNT FIVE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of July 2012 to the 31st day of July 2012, at Welagi Taveuni in the Northern Division penetrated the vagina of* ***F. N*** *with his finger without her consent.*

COUNT SIX

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 154(1) of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of November 2005 to the 31st day of December 2005, at Nasinu in the Central Division unlawfully and indecently assaulted* ***R. V.***

COUNT SEVEN

Statement of Offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code Cap 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of November 2005 to the 31st day of December 2005, at Nasinu in the Central Division had unlawful carnal knowledge of* ***R. V*** *without her consent.*

COUNT EIGHT

Statement of Offence

ATTEMPTED RAPE: *Contrary to Section 151 of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of February 2006 to the 28th of February 2006, at Nadera Nasinu in the Central Division, attempted to have unlawful carnal knowledge of* ***K. L. V*** *without her consent.*

COUNT NINE

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 154 (1) of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of February 2006 to the 28th of February 2006, at Nadera Nasinu in the Central Division, unlawfully and indecently assaulted* ***K. L. V*** *by kissing her lips.*

COUNT TEN

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 154 (1) of the Penal Code Cap. 17.*

Particulars of Offence

JONE RABUNO COKANAUTO *between the 1st day of February 2006 to the 28th of February 2006, at Nadera Nasinu in the Central Division, unlawfully and indecently assaulted* ***K. L. V*** *by penetrating her vagina with his finger*

[2] After full trial, on 23 June 2017, first assessor had found the appellant guilty of counts 1 to 7, and not guilty of counts 8, 9 and 10. Second assessor had found the appellant guilty on all counts, while the third assessor had found the appellant not guilty on all counts. Thus, the assessors had returned with mixed opinions. The learned trial judge in his judgment dated 26 June 2016 had found the appellant guilty as charged on all counts, and convicted him accordingly. He was sentenced on 27 June 2017 as follows subject to a non-parole period of 19 years.

> '*(i) Count No. 1 : Rape : 16 years imprisonment*
> *(ii) Count No. 2 : Rape : 16 years imprisonment*
> *(iii) Count No. 3 : Rape : 16 years imprisonment*
> *(iv) Count No. 4 : Indecent Assault : 2 years imprisonment*
> *(v) Count No. 5 : Rape : 16 years imprisonment*
> *(vi) Count No. 6 : Indecent Assault : 2 years imprisonment*
> *(vii) Count No. 7 : Rape : 16 years imprisonment*
> *(viii) Count No. 8 : Attempted Rape : 5 years imprisonment*
> *(ix) Count No. 9 : Indecent Assault : 2 years imprisonment*
> *(x) Count No. 10 : Indecent Assault : 2 years imprisonment'*

[3] The trial judge had stated in the sentencing order that because of the totality principle, the sentences in the first, fourth and sixth counts were made to run consecutively making the total sentence of 20 years imprisonment. All the other sentences had been made concurrent to the above sentence, making a final sentence of 20 years of imprisonment.

[4] Timely notice of appeal against conviction and sentence had been filed on 26 July 2017 (17 grounds of appeal against conviction and one ground of appeal against sentence) followed by an application for bail pending appeal on 03 April 2019 along with an

affidavit. There had been a change of the appellant's solicitors in February 2020 and written submissions on behalf of the appellant had been tendered on 26 March 2019 by his new solicitors and the State had filed its written submissions on 18 May 2020.

[5] The evidence against the appellant had been summarised by the learned trial judge in the sentencing order as follows.

[6] At the age of 38 years, the appellant had founded a prayer group called the Jezreel Lion of Judah Ministry at Vunidawa, Welagi, Taveuni. He had organized prayer groups of 10 to 12 people or less, and prayed for the sick and those experiencing life difficulties. His Ministry had been based on Christian principles, and most of his teachings and sermons had been sourced from the Bible. However, his group had not been formally registered as a church.

[7] According to the complainants, the appellant had often preached on the bible story of the "woman from Samaria" in Saint John, chapter 4 verse 1 to 42. In that story, Jesus offered the "living water" to the woman of Samaria so that she could thirst no more. The "living water" in the story meant "the gift of the holy spirit and the grace of God". He had misinterpreted the living water to mean his 'sperm' and through his teachings, he had told them that he needed to have sex with them to cleanse them, as they were the temples of God. He had allegedly managed to convince those vulnerable young women to his web of deceit.

[8] In February 2005, in a prayer session in his bedroom, he had raped complainant no. 01 (PW1- count no. 01). She was 18 years old at the time. The appellant was 43 years old. Between August and November 2005, he had raped her again (count no. 02).

[9] Between November and December 2005, the appellant had indecently assaulted complainant no.03 (PW3 - count no. 06). During the same time he had again raped her (count no. 07). She was 19 years old at the time.

[10] Between January and July 2006, the appellant had indecently assaulted complainant no. 02 (PW2 - count no. 04). She was 22 years old at the time.

[11] In February 2006, the appellant had attempted to rape complainant no. 04 (PW4- count no. 08), then indecently assaulted her twice (count no. 09 and 10). She was 20 years old at the time.

[12] Between July and December 2006, the appellant raped complainant no. 01 (PW1- count no. 03).

[13] In July 2012, the appellant had raped complainant no. 2 (PW2- count no.5).

[14] The learned trial judge had summarized the appellant's case as follows.

> *'On oath, the accused denied the complainants' allegations against him. He said, he did not rape or attempted to rape or indecently assaulted them. He denied the complainants' version of events, as to how he preached on the bible. He said, he never did what the complainants alleged against him. You have heard the details of his evidence in the courtroom, and I don't wish to bore you with the details. If you find the accused's sworn denials credible and you accept them, then you will have to find him not guilty as charged on all counts. It is matter entirely for you.'*

[15] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

Law on bail pending appeal

[16] 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."*

[17] 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)

[18] 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.'*

[19] 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).'*

[20] 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'*

[21] 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...."*

[22] 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 ... ."*

[23] ***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."*

[24] 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. 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.

[25] 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.

[26] 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'.

Grounds of Appeal

Against Conviction

(1) *'That the learned Trial Judge erred in fact and in law in failing to accept the submission by defence counsel after the close of Prosecution's case in the Court below, that the Applicant has not case to answer on the ground that the penal code offence he was charges with are nullity because they were not saved and/or transitioned by sections 391, 392 and 393 of the Crimes Act.*

(2) *That the Learned Trial Judge erred in fact and in law in directing and assisting the prosecution after the close of its case to call two witnesses to give their opinions on John Chapter 4 verses 1 to 32 in the Holy Bible, when the Learned Trial Judge had not power to do so.*

(3) *That the Learned Trial Judge erred in fact and in law in directing and forcing Kelera Ledua Vueti to give evidence despite her refusal to do so prior to and at trial, by threatening the witness with imprisonment under Section 119 of the Criminal Procedure Act.*

(4) *That the Learned Trial Judge erred in fact and in law in failing to properly direct the assessors and consider in his Judgment the dangers of convicting the Applicant on the evidence of an unwilling witness like Kelera Ledua Vueti, who was forced and threatened with imprisonment to give evidence against the applicant.*

(5) *That the Learned Trial Judge erred in fact and in law in failing to properly direct the assessors and consider in his Judgment the dangers of convicting the Applicant on unrecent complaint evidence.*

(6) *That the Learned Trial Judge erred in fact and in law in holding that the Applicant used the Holy Bible to satisfy his sexual lust and desires when all complainants admitted in evidence that they consented on their own interpretation of the bible verse in John 4.*

(7) *That the Learned Trial Judge erred in fact and in law in not assessing properly the evidence for the Prosecution on consent, which, in the circumstance of the whole case, could not have been negated by false representation.*

(8) *That the Learned Trial Judge erred in law and in fact and in disagreeing with the opinion of the first assessor that the Applicant is not guilty of counts 8, 9 and 10 in the Information, without the coherent and rational analysis of the*

evidence in the trial, thus negating the first assessor's statutory or legal role as a judge of fact.

(9) That the Learned Trial Judge erred in law and in fact in disagreeing with the opinion of the third assessor that the Applicant in not guilty of all counts in the information, without a coherent and rational analysis of the evidence in the trial, thus negating the first assessor's statutory or legal role as a judge of fact.

(10) That the Learned Trial Judge erred in law and in fact in holding that lack of consent due to false representation can be in hindsight.

(11) That the Learned Trial Judge erred in law and in fact in failing to hold that the evidence of the Applicant, Kelera Adi and Selai Lofia exposed Unaisi Diyagiyagi's evidence on Counts 1, 2, and 3 as false thus supporting the Applicant's evidence as true.

(12) That the Learned Trial Judge erred in law and in fact in failing to hold that the evidence of the Applicant, Kelera Adi, Selai Lofia and Losalini Tikoitoga Nalawa exposed Fine Naivalurua's evidence on Counts 4 and 5 as false thus supporting the Applicant's evidence as true.

(13) That the Learned Trial Judge erred in law and in fact in convicting the Applicant, despite the absence of recent complaint in that the offences were committed in 2005 and 2006 while the complaints complained in 2015, a period of silence of 10 years.

(14) That the Learned Trial Judge erred in law and in fact in receiving redirections in the presence of the assessors however, failed to put redirection issues across to the assessors.

(15) That the Learned Trial Judge erred in law and in fact in failing to hold that false representation is a non-issue and does not apply because the complainant's evidence was that they were mistaken and the nature of the act was clean to them i.e. sexual intercourse was going to be involved.

(16) That the Learned Trial Judge erred in law in fact in failing to allow counsel time to file written submissions in mitigation and sentencing due to time constraints as another trial was to begin in his court.

(17) That the Learned Trial Judge erred in law and in fact in failing to consider the state of mind of the complainants as opposed to what the Applicant did.

(18) That the Learned Trial Judge erred in law in failing to consider evidence of Kelera Vueti that when the Applicant's penis did not fit, he withdrew it.

01st ground of appeal

[27] The appellant argues that that the penal code offence the appellant was charged with are a nullity because they were not saved and/or transitioned by sections 391, 392 and 393 of the Crimes Act.

[28] Section 391, 392 and 393 of the Crimes Decree (now Act) are as follows.

> *391. — (1) The Penal Code is repealed.*
>
> *(2) This section shall apply subject to sections 392 and 393.*
>
> *'Savings provisions*
>
> *392. — (1) Nothing in this Decree affects the validity of any court proceedings for an offence under the Penal Code which has been commenced or conducted prior to the commencement of this Decree.*
>
> *(2) When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court shall apply the penalties prescribed for that offence by the Penal Code.*
>
> *Transitional provisions*
>
> *393. — (1) for all purposes associated with the application of section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Decree, and for the purposes of the proceedings relating to such offences the Penal Code shall be deemed to be still in force.*

[29] The appellant's argument is applicable to all counts except the fifth count which is under the Crimes Decree, 2009. Section 392 does not apply to and cannot save the court or judicial proceedings in respect of counts 1- 4 and 6 -10 in as much as those proceedings for the offences under the Penal Code had admittedly not commenced prior to the commencement of the Crimes Decree.

[30] In my view section 393 (1) has two parts. They are as follows.

> *(i) for all purposes associated with the application of section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Decree*
>
> *AND*
>
> *(ii) for the purposes of the proceedings relating to such offences the Penal Code shall be deemed to be still in force.*

[31] The first part of section 393(1) does not seem to include, cover or apply to counts 1- 4 and 6 -10, for the reason that it makes the Penal Code applicable to any offences committed against the Penal Code prior to the commencement of the Crimes Decree, for all purposes associated with the application of section 392 which means that the first part of section 393(1) does apply to offences committed against the Penal Code where proceedings for those offences under the Penal Code had commenced prior to the commencement of the Crimes Decree.

[32] However, the second part of section 393(1) makes the Penal Code still operative or deemed to be in force '*for the purposes of the proceedings relating to such offences'*. Do *'such offences'* mean (a) only those offences committed prior to the commencement of the Crimes Decree or (b) those offences not only committed prior to the commencement of the Crimes Decree but also proceedings for them under the Penal Code had commenced prior to the commencement of the Crimes Decree?

[33] I take the view that *'such offences'* mean those offences committed prior to the commencement of the Crimes Decree under (a) above. Because, those offences committed prior to the commencement of the Crimes Decree and also proceedings for them under the Penal Code had commenced prior to the commencement of the Crimes Decree under (b) above are already covered by the first part of section 393 (1) read with section 392(1).

[34] However, I think that given the wider consequences of the appellant's objection based on the interpretation of section 391, 392 and 393 of the Penal Code that could be felt far beyond this case, it is better that the full court of the Court of Appeal rules on the appellant's argument including as to whether the appellant should have raised it before pleading to the information in respect of counts 1- 4 and 6 -10 rather than waiting till the end of the prosecution case to be taken up as part of no case to answer submission.

[35] Therefore, the first ground of appeal can go to the full court hearing as a pure question of law and technically no leave to appeal is required. Nevertheless, I do not think that

it has a reasonable prospect of success or consequently a very high likelihood of success.

2nd ground of appeal

[36] The appellant's complaint is that the learned trial judge after the State closed the case for the prosecution had summoned two witnesses on his own without any application by the State and their evidence had been later relied on to prove charges against him. He also alleges bias on the part of the learned trial judge arising from this course of action.

[37] Without the benefit of the complete appeal record, I am not in a position to examine the appellant's allegations. The appellant has not cited any statutory provision or a judicial authority to support his argument that the learned trial judge had no power at all to adopt the course of action that he did in calling those two witnesses. The State had submitted that the appellant had the full right of cross-examination of those two witnesses and in fact his counsel did cross-examine them and therefore no material prejudice had been caused to the appellant. **Koya v State** [1998] FJSC 2; CAV0002.1997 (26 March 1998) and more recently in **Raikadroka v State** [2020] FJCA 12; AAU80.2014 (27 February 2020) set out the test to be applied in the case of alleged bias on the part of the trial judge and whether in this instance the appellant could satisfy the test of bias is a matter to be decided upon the perusal of the full record.

3rd and 4th grounds of appeal

[38] The appellant's grievance here is that the learned High Court judge had forced the witness called Kelera Ledua Vueti to give evidence against the appellant despite her refusal threatening her that she would be imprisoned under section 119 of the Criminal Procedure Act. He also submits that the learned trial judge should have warned the assessors of the danger of convicting the appellant on the evidence of such an unwilling witness. However, the State has submitted that the relevant section is not section 119 but section 118 of the Criminal Procedure Act on uncooperative witnesses and further submits that since she became cooperative and gave evidence there was no need for a warning to the assessors as demanded by the appellant.

[39] These grounds of appeal too can be examined purposefully only with the proceedings of what exactly transpired at the trial which are not available at this stage.

5th and 13th grounds of appeal

[40] The appellant contends that the learned trial judge failed to have directed the assessors of the dangers of convicting the appellant on unrecent (sic) complaint. What the appellant is trying to argue is that the complaints were belated and he should not have been convicted in the absence of recent complaints as the offences related to 2005 and 2006 whereas the complaints were made in 2015.

[41] As far as I am aware there is no provision of law to say that no sexual offender could be convicted in the absence of a recent complaint. If the prosecution relies on recent complaint evidence then the trial judge should address the assessors on how to evaluate that evidence for consistency, credibility and not for truth (see for example **Senikarawa v. State** [2006] FJCA 25; AAU0005.2004S (24 March 2006), **State v. Likunitoga** [2018] FJCA 18; AAU0019.2014 (8 March 2018), **Anand Abhay Raj v. State** [2104] FJSC 12; CAV0003.2014 (20 August 2014) and **Kumar v State** [2018] FJCA 65; AAU0126.2013 (1 June 2018).

[42] It appears from the summing-up that the trial judge had not specifically addressed the assessors on the belatedness of the complaints. However, the absence of any reference to belatedness has to be examined in the context whether the defense in fact tried to discredit the complainants' evidence on that basis. If belatedness was not a live issue at the trial there was no reason for the trial judge to address the assessors or himself on that. This can be verified only with the full appeal record.

7th, 10th and 15th grounds of appeal

[43] The appellant is challenging the question of consent in that according to him the complainants had testified that various sexual acts were done by him with their consent. In paragraph 42 of the summing-up the learned trial judge had stated:

> *'It was the prosecution's case that all complainants consented to the sexual acts because the accused misused and misinterpreted the bible to them to say that he had to have sexual intercourse with them to cleanse them spiritually. The complainants said the accused preached to them that women were prostitutes, and also temples of God. They had to be cleansed by him penetrating their vaginas with his penis, and he ejaculating therein, and his semen was the water of life, which would purify them as temple of God. The complainants said he was doing so as the man of God. The prosecution argued that the accused's sermons and teachings were nothing but a deception to the girls, to enables him to have sexual intercourse and contacts with them. The prosecution argued, if they ever consented, the consents were, in law, because of the deceptions, not consent in law.*

[44] The trial judge had dealt with this issue as follows in his judgment

> *'13.I find that on most occasions, the complainants consented to the various sexual acts performed on them by the accused, at the material times; however, I find that the accused falsely misrepresented the sexual acts to the complainants in his sermons and biblical teachings, to the extent that he was in fact deceiving them as to the true nature of the acts, that is, he was not "cleansing them", he was in fact raping, attempting to rape and indecently assaulting them. I find that their so called "consent" to the sexual acts, was not real consent in law, and I find, as a matter of fact that, all the complainants did not consent to the sexual acts done by the accused, on all counts. I also find, as a matter of fact that, at the times he was performing the sexual acts, he knew or couldn't careless whether or not they were consenting to the sexual acts.'*

[45] The appellant's complaint has to be looked at in the background where he had completely denied having engaged in any sexual acts with the complainants. His challenge on the issue of consent becomes weak to that extent. If the trial judge had directed the assessors on consent, and the assessors and the judge had accepted that the so called consent on most occasions was not in fact consent particularly in terms of section 206 (2) (e) of the Crimes Act, at that point the appellant's argument runs out of steam.

[46] These grounds of appeal have no reasonable prospect of success and consequently no very high likelihood of success.

6th, 11th, 12th and 18th grounds of appeal

[47] The appellant's argument under these grounds also relate to the issue of consent from a different angle. He argues that all the complainants admitted in evidence that they had acted on their own interpretations in consenting to the appellant having various sexual acts with them.

[48] The State however disagrees and submits that the complainants' position was that they consented on most occasions believing the accused's preaching that women were prostitutes, and also temples of God. Further, they had to be cleansed by him penetrating their vaginas with his penis, and ejaculating therein, and his semen was the water of life, which would purify them as temple of God. The complainants had said that the appellant was doing so as the man of God.

[49] Thus, if the assessors had believed the prosecution evidence that the appellant's was a false and fraudulent representation about the purpose of the sexual acts performed by him then they and the trial judge were justified in rejecting the appellant's position that the complainants had acted on their own interpretations and acted on them in allowing the appellant to engage in various sexual acts with them.

[50] These grounds of appeal have no reasonable prospect of success and consequently no very high likelihood of success.

8th and 9th grounds of appeal

[51] The appellant contends that the learned trial judge had not given rational and coherent analysis of the evidence in disagreeing with the first assessor and the third assessor. It must be borne in mind that sub-section (5) of section 237 of the Criminal Procedure Act specifically provides that

> *"(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes."*

[52] Thus, when one looks at the cogent reasons it is not only the trial judge's reasons but also the summing-up has to be taken into account. In this instance the trial judge had disagreed with the majority of the assessors only in respect of counts no. 08, 09 and 10. The trial judge had accepted the evidence of the complainants on all counts and given reasons for upholding all the charges against the appellant.

[53] The assessors are not deciders of fact in Fiji and their role is that of rendering assistance to the trial judge on facts. In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016), the Supreme Court held on the role of assessors and the judge as follows.

> *'58.'In Noa Maya v. The State* [2015] FJSC 30*; CAV 009. 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*
>
> *"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[54] These grounds of appeal have no reasonable prospect of success and consequently no very high likelihood of success.

14th and 17th grounds of appeal

[55] The written submissions of the appellant have not dealt with 14th and 17th grounds of appeal against conviction and therefore, I assume that the appellant does not wish to pursue those grounds of appeal against conviction in appeal.

16th ground of appeal

[56] The 16th ground of appeal is against sentence where the appellant complains that the learned trial judge had not allowed time for the written submission in mitigation to be filed on behalf of the appellant. I cannot look into this complaint without the benefit of the complete appeal record at this stage.

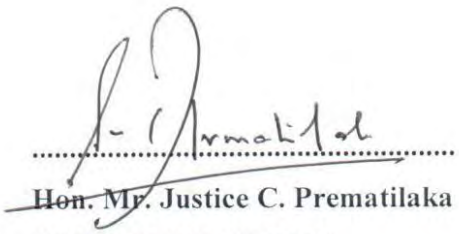
[57] In the circumstances, overall there is no reasonable prospect of success in the appellant's appeal. Therefore, there is no very high likelihood of success in his appeal either.

[58] The appellant has not demonstrated any exceptional circumstances to consider bail pending appeal independent of the above considerations.

[59] However, leave to appeal against conviction is allowed as a matter of formality in respect of the first ground of appeal for the reasons set out above, leave to appeal against sentence and bail pending appeal is refused.

Order

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL