

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

CRIMINAL APPEAL NO.AAU 156 of 2019
[In the High Court at Lautoka Case No. HAC 02 of 2019]

BETWEEN : **AMENONI NASILASILA**

AND : **THE STATE** *Appellant*
Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. Naivalu for the Appellant**
: **Mr. L. J Burney for the Respondent**

Date of Hearing : **27 August 2021**

Date of Ruling : **03 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on a single count of rape contrary to section 207 of the Crimes Act, 2009 committed at Sigatoka in the Western Division on 22 December 2018.

[2] The information read as follows:

Statement of Offence

RAPE: *Contrary to Section 207 of the Crimes Act 2009.*

Particulars of Offence

AMENONI NASILASILA *on the 22nd day of December 2018 at Sigatoka in the Western Division had carnal knowledge of the complainant without her consent.*

- [3] At the conclusion of the summing-up, the assessors had opined that the appellant was not guilty. The learned trial judge had disagreed with the assessors, convicted the appellant on 20 September 2019 and sentenced him on 23 October 2019 to 08 years of imprisonment with a non-parole period of 06 years.
- [4] The appellant's solicitors had lodged a timely notice of appeal and application for leave to appeal (21 November 2019) against conviction (10 grounds of appeal). His application for bail pending appeal had been tendered on 20 July 2020. His solicitors had lodged an amended notice of appeal (12 grounds of appeal) and written submissions on the conviction appeal and bail pending appeal application on 20 August 2020. The appellant had also tendered an affidavit with 03 annexures in support of his allegations against trial counsel contained in the first amended ground of appeal on 20 August 2020. The respondent's written submissions had been filed on 14 September 2020. The appellant's trial lawyers had replied to the allegations against them by separate affidavits (23 October 2020) and the appellant's affidavits (02) in reply had been filed on 12 November 2020. The appellant's counsel had filed written submissions on the amended first ground of appeal on 23 December 2020 and the two trial counsel had responded by their separate written submissions lodged on 19 April 2021. Counsel for the appellant and the respondent have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.
- [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 in a timely appeal for leave to appeal against conviction is 'reasonable prospect of success' [see Caucau v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Waqasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudhry v State [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and Naisua v State [2013] FJSC 14; CAV

10 of 2013 (20 November 2013)] from non-arguable grounds [see Nasila v State [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The amended grounds of appeal are as follows:

'Ground 1

THAT the Appellant wishes to criticize his former trial counsel on the following grounds:

- i. When the Appellant was about three-quarter way into his caution interview with the Police on 22 December, 2018 he was advised by Unaisi Baleilevuka, one of two of his former trial counsel vide mobile phone to remain silent and to say everything in court which did not happen.*
- ii. On the three separate occasions that he visited Ms Baleilevuka at her Namaka Office she kept reassuring him that he would win the case which gave him a huge confidence boost and a great relief as there was no rape and the whole incident was all consensual.*
- iii. He gave Ms Baleilevuka all his revealing chats/messages with the complainant on Messenger after he was asked for evidence and that these chats/messages spanned throughout a period of some 19 months (11 May, 2017-22 December, 2018) but which chats/messages were never tendered into evidence.*
- iv. On the first day of trial when he went to see Ms Baleilevuka, he was told that Mr Anthony would assist her so they met briefly that morning at the latter's office, signed a document, before they all left for court by 9.30am.*
- v. While his former trial counsel before the trial they never discussed a strategy or the strengths or weakness of the case.*
- vi. He knew Ms Baleilevuka was his lead defence counsel but during the trial he could see that Mr Anthony had slowly taken over which frustrated and confused him.*
- vii. He was not being updated progressively during breaks of what was transpiring in terms of what was the evidence already accepted by the court and how they were to counter them and in what specific manner so that he could be made aware of it.*

- viii. *Before the defence case he gathered enough courage to ask his former trial counsel whether he was going to give sworn evidence or not and they both replied, “up to you.”*
- ix. *There was no document signed regarding his choosing to remain silent.*

Ground 2

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself when he stated that at paragraph [9] of the Judgment – “since the accused had not given evidence there was no evidence from him to contradict the account of the complainant”. By so doing the Learned Trial Judge shifted the burden of proof and as such there was a substantial miscarriage of justice.

Ground 3

THAT in so shifting the burden of proof the Learned Trial Judge acted contrary to Section 14 (2)(j) of the 2013 Constitution and as such caused a substantial miscarriage of justice.

Ground 4

THAT the Learned Trial Judge misdirected himself on the evidence of Mr. Mataibau on the question of recent complaint and made serious error when he held that the recent complaint “negates consent” and as such caused substantial miscarriage of justice.

Ground 5

THAT the Learned Trial Judge erred in law and in fact in not directing himself when finding that the evidence of the complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to police and that which she gave to the medical doctor. Failure to direct himself on previous inconsistent statement in law of the complainant caused substantial miscarriage of justice.

Ground 6

THAT the Learned Trial Judge erred in law and in fact in overturning the unanimous decisions of the Assessors of Not Guilty and failing to consider that the facts of the case and the evidence given by each of the witnesses clearly indicated that the Complaint by the complainant was highly likely to be falsely made.

Ground 7

THAT the Learned Trial Judge erred in law and in fact not taking into serious consideration the medical evidence which was not conclusive and as such the benefit of doubt ought to be given to the Appellant and failure to do so caused substantial miscarriage of justice.

Ground 8

THAT the Learned Trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors of Not Guilty did not give cogent reasons as to why he overrules the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.

Ground 9

THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself that the prosecution evidence before the Court proved beyond reasonable of doubts that there were serious doubt in the prosecution case and as such the benefit of doubt ought to have been given to the Appellant.

Ground 10

THAT the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it.

Ground 11

THAT the Learned Trial Judge misdirected when he held in his judgment at paragraph [6] that “I do not think Mr. Katonibau’s meeting with the complainant at the eatery was a coincidence.”

Ground 12

THAT further His Lordship had compounded his misdirection by not critically analysing the evidence whereupon the complainant’s attempt to withdraw her complaint at the Police Station she was told that she could not.

Ground 13

THAT the Appellant reserved the right to appeal such further and other Grounds as the Appellant may be advised upon receipt of the Court Record.

[7] The trial judge had summarized the evidence for the prosecution and the defense as follows in the sentencing order:

[2] *The victim is in her early twenties. She migrated to the USA when she was in her teens. Currently, she is a flight attendant with an American airline. She first met the Accused in 2017 when he was representing Fiji in the Sevens Rugby tournament in the USA. They developed a friendship and were in contact on social media. That relationship ended in the beginning of 2018. However, she remained in contact with the Accused because of her past friendship with him. When the incident occurred she was in a new relationship.*

[3] *The incident occurred when the victim came to Fiji for a visit. She was scheduled to return to her home on 22 December 2018. On this day she was staying with her aunt at Olosara, Sigatoka. According to the victim, the Accused turned up at her residence with two other male friends. She said the Accused was intoxicated. They had a friendly conversation and she introduced her aunt to him because of his celebrity status. After a while her aunt left their home for town with the two boys who had accompanied the Accused.*

[4] *The victim said she stayed back alone with the Accused because she trusted him. They sat on the front porch chatting when she heard notifications on her mobile phone which was inside one of the bedrooms. When she went inside the house, the Accused followed and forced himself on her by pushing her on a mattress and pulling down her undergarment. She pushed him off and ran to the bathroom to get away from him. But before she could lock the door, he forced himself inside the bathroom, pushed her on the floor and raped her. Her pleas for him to stop were ignored by him. He left her in the bathroom in a distressed condition when he realised his friends had returned to the house.*

[5] *The victim complained to her boyfriend that the Accused raped her shortly after the incident. The matter was reported and the victim was medically examined the same evening. Apart from abrasions on the genitalia, the victim did not sustain bodily injuries.*

[8] The appellant had remained silent but called one witness, Mr. Isake Katonibau any at the trial.

01st ground of appeal

[9] First amended ground of appeal consisting of paragraphs (i) to (ix) contain allegations or criticisms levelled against the appellant's two trial counsel. The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the

procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had complied with those procedural steps after filing amended grounds of appeal (20 August 2020) almost 09 months after his initial notice of appeal (21 November 2019) which did not contain any allegation or criticism of his trial counsel. The Court of Appeal delivered the judgment in **Chand** on 28 November 2019.

[10] The material criticisms/allegations against trial counsel contained in the first amended ground of appeal and in his affidavit can be summarised or highlighted under the following headings:

- (i) Ms. Unaisi Baleilevuka, one of the trial counsel advised the appellant at some stage during his cautioned interview to remain silent and to tell everything in court.
- (ii) Ms Baleilevuka failed to tender in evidence all chats/messages (given to her) that the appellant and the complainant exchanged with each other preceding the allegation of rape.
- (iii) Ms Baleilevuka drafted the other trial counsel Mr Mark Anthony, who seemingly became the lead counsel later, into the defence team but both of them failed to discuss with the appellant the defence strategy, strengths or weakness of the case, how to counter the prosecution case and to update him on how the case against him was progressing.
- (iv) When asked whether he should give evidence at the trial both counsel advised the appellant that it was up to him and he did not agree in writing to remain silent.

[11] It is clear that the gits of all criticisms/allegations is the incompetence of the trial counsel and therefore to succeed in appeal the appellant must convince the appellate court that either the alleged incompetence of trial counsel (such as not presenting his defence to court) caused a miscarriage of justice in that it affected the outcome of the

trial in such a way as to cause the appellant squander a reasonable prospect of acquittal in the light of the totality of evidence [see for example paragraph [12] and [24] of **Nudd v The Queen** (2006) HAC 9 and **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) or the alleged conduct of trial counsel otherwise deprived him of due process of law or a fair trial [see paragraphs [87], [99] & [100] of **Nudd; Anderson v HM Advocate** HCJ 1996/1996 JC 29].

[12] In the first instance the focus is on the outcome or result consequent to the alleged incompetence (see also **Regina v Clinton** CACD 1993/[1993] 1 WLR 1181) and in the second instance irrespective of the impact of the trial counsel's failings or faulty conduct on the outcome/result, the question posed is whether accused's right to have a fair trial had been denied as a result of material errors or irregularities occasioned by the counsel's incompetence. It appears that the appellant's complaint is a mix of both. In my mind, in either event to set aside a conviction in the contest of Fiji an appellant should ultimately establish any one of the grounds in terms of section 23 of the Court of Appeal Act including miscarriage of justice.

[13] Both counsel in their affidavits have refuted the allegations.

[14] Ms. Baleilevuka has stated that at the request of Manager of Fiji 7s Rugby Team she spoke and explained to the appellant all his rights over the phone when he was at the police station including his right to remain silent. She also admits to have advised him at some stage on her reading of disclosures that he had a reasonable prospect of succeeding in his defence of consent. According to her, the appellant had given her and co-counsel the text messages on Facebook establishing a prior romantic relationship between him and the complainant and they were to confront the complainant with them if she was to deny such a relationship. However, she had confirmed the previous relationship with the appellant under cross-examination and therefore, in their opinion there was no need to produce the messages. In addition, not all messages were in favour of the appellant. Ms. Baleilevuka has also adverted to the fact the appellant had known, consented and confirmed Mr. Anthony's involvement as co-counsel in the case when both of them visited his office. Two of them had appeared for the appellant since the pre-trial stage *bro bono* when he disclosed his

financial embarrassments. Prior to the trial date the appellant had met Ms. Baleilevuka and Mr. Anthony three times and they discussed defence strategy well before the trial date and again discussed his defence for over 30 minutes at the latter's office before setting off together for the trial. The counsel had sought and obtained from DPP several additional disclosures relevant the defence of consent. According to Ms. Baleilevuka the appellant was informed of his rights including the right to remain silent and had indicated well before the commencement of the trial proper his preference to remain silent at the trial as he was uncomfortable to take the stand and testify and she had advised him that it was his constitutional right and no adverse inference could be drawn therefrom and gave him the option to remain silent or give evidence. Thus, the counsel had advanced his defence of consent through cross-examination of the complainant. Ms. Baleilevuka also has averred that both counsel constantly updated the appellant of the progress of the case both in iTaukei and English and consulted him on matters arising from the complainant's evidence. The appellant had maintained his stance not to take the stand even at the end of the prosecution case and they called the defence witness as per his instructions as requested by the appellant from the outset.

[15] Mr. Mark Anthony, the co-counsel has basically affirmed what Ms. Baleilevuka has stated in her affidavit. He has confirmed *inter alia* that the appellant informed them of his reluctance to take the stand and testify as he was uncomfortable in doing so but insisted calling a defence witness. He has also stated that since the complainant admitted the prior romantic relationship with the appellant under cross-examination they did not have to produce the text messages at the trial. Further, since one of the messages among other messages (where the complainant had alleged rape against the appellant) would have had an adverse impact on the appellant's defence of consent they in consultation with the appellant had decided not to mark any of the chat messages.

[16] Mr. Mark Anthony has averred that the new counsel in fact consulted him in drafting the original grounds of appeal in about October/November 2019.

- [17] Both counsel have stated that their trial strategy had succeeded to the extent that the assessors came back with an opinion of not guilty at the end of the summing-up despite the appellant not taking the stand and the text messages not having been produced at the trial. They have also stated that the new counsel's attempt to raise a ground of appeal based on incompetence of trial counsel appears to be aimed at obtaining bail pending appeal and it is devoid of merits, frivolous and scandalous and pointed out that the new counsel in his email to them had stated that the DPP would have difficulties in responding to the new ground of appeal. Incidentally, the email in question had not specified any allegations or the nature of them.
- [18] The appellant has filed two affidavits in reply to the trial counsel's affidavits and stated *inter alia* that the new counsel merely was following his instructions in raising the new ground of appeal based on incompetence of trial counsel. He has reiterated that he did not opt to be silent and believes that silence was not an option to convince the court of consensual sex but had to take the stand and testify as to his side of the story in the same way that he did during the investigation. He has also said that the text messages would have demonstrated a special relationship between him and the complainant over and above a mere romantic relationship. According to him the learned trial judge had overturned the assessors' opinion as there was no evidence to contradict the complainant's evidence on non-consensual sex and the omission had been fatal causing a miscarriage of justice. He has also disclosed that the new counsel had sent the draft of the original grounds of appeal to trial counsel who had agreed with it until the new counsel read **Chand v State** (supra) implying that the appellate counsel decided to raise the ground of appeal on incompetence of trial counsel only after studying **Chand**.
- [19] I find that the initial grounds of appeal and the amended grounds of appeal had been settled by one and the same counsel *i.e.* the appellant's appellate counsel. The amended grounds of appeal (20 August 2020) are more or less the same as the initial grounds of appeal (21 November 2019) except the new amended ground of appeal on incompetence of counsel, the new 03rd, 11th and 12th amended grounds. Initial 09th ground had been omitted.

- [20] The appellant has stated in his affidavit that after the first call-over date in the Court of Appeal on 27 July 2020 his counsel had informed him that he had come across **Chand v State** (supra) and asked whether he had any allegations against trial counsel and having replied in the affirmative he had outlined them to his appellate counsel on 04 August 2020.
- [21] Incompetence of trial counsel as a ground of appeal against conviction has been known to criminal law and criminal lawyers for a very long time. All what **Chand v State** (supra) did was to set down clear guidance on procedural steps in pursuing such a ground in appeal.
- [22] Had the appellant entertained strong reservations about the competence of his trial counsel he should and could have expressed them to his appellate counsel at the outset. The fact that the initial notice of appeal did not contain incompetence of counsel as a ground of appeal shows that either the appellant had not enlightened the his appellate counsel of the same which probably meant that he did not entertain misgivings about his trial counsel or the appellate counsel (if he had been told) had thought it not worthy pursuing such a ground of appeal until he discovered **Chand v State** (supra). What is most plausible is that concerns of incompetence of trial counsel did not exist when the initial notice of appeal was filed and it was thought of by the appellate counsel because he came across **Chand v State** (supra) nearly 10 months later as he thought that the DPP would not be in a position to respond to it effectively. The appellant on his part had raised his reservations only when the appellate counsel specifically questioned him (by way of a leading question) whether he had any allegations against trial counsel.
- [23] The overall picture that emerges from the affidavits & counter affidavits of the appellant and trial counsel is that this ground of appeal based on incompetence of counsel is most probably an afterthought. Otherwise, the appellate counsel could have raised incompetent advocacy as a ground of appeal based at least on the appellant's silence at the trial even in the initial notice of appeal as he would have seen that the trial judge in the judgment had stated that since the appellant did not give evidence, there was no evidence from him to contradict the account of the complainant. It

appears that the appellate counsel had not felt until he had read Chand that from the summing-up and the judgment that there was a legitimate basis for a ground of appeal based on incompetent advocacy. There was never any doubt of the existence of a previous romantic relationship from 2017 till the beginning of 2018 between the appellant and the complainant in the mind of the trial judge. It was admitted by the complainant. On the totality of the material before me relating to trial counsel's alleged incompetence, I have reasonable doubts about the credibility of the appellant's allegations/criticisms.

[24] However, to be fair by the appellant I shall still examine the question whether alleged incompetence of trial counsel had caused a miscarriage of justice in that it affected the outcome of the trial in such a way to deny the appellant a reasonable prospect of acquittal or whether he had been otherwise deprived of a fair trial.

[25] In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty [Silatolu v State [2008] FJSC 48; CAV0002.2006 (29 February 2008)]

[26] Yet, O' Connor LJ said in Swain [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In Boal [1992] QB 591 counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of 'flagrantly incompetent advocacy'.

[27] In Ensor [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in Gautam [1988] Crim. LR 109 CA (Crim Div):

' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'

[28] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:

‘[21]..... It is not for a court to inquire into the advice tendered by counsel to his client..... But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client.....’

[29] NSW Court of Criminal Appeal in **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9 is an authority (Gleeson CJ, McInerney J and Lusher AJ 4, 11 May, 7 June 1990) to the following propositions:

‘As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of the barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case.’

‘As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

‘However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.’

[30] Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681 said:

‘48. It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been

made by the defendant personally. Nor will other forms of mere error of judgment.

49. Nevertheless, the courts have recognised that in some exceptional instances, an error of sufficient proportion and consequence will enable the court to intervene and avert a miscarriage of justice. To describe this ground, the expression “flagrant incompetence” has generally been used’ (emphasis added).’

[31] The mere fact that the appellant’s counsel in retrospect thinks that the defense case would have been conducted differently certainly does not amount to incompetent or flagrantly incompetent advocacy on the part of the trial counsel. The main thrust of this ground of appeal comes from two matters; the failure of the trial counsel to produce the text messages and not advising the appellant to take the stand and testify to his having had sexual intercourse with the complainant’s consent. Both these aspects are still within the overall strategy of consensual sex already advocated at the trial.

[32] I do not believe that the trial counsel would have advised the appellant not to take the stand against his wish, for if he was keen to give evidence there was nothing for him or trial counsel to fear in terms of getting contradicted by his cautioned statement (or perhaps even the charge statement) as he claims to have taken up his side of the story namely his position of consensual sex in his cautioned statement (see paragraph 3 of his affidavit in reply to Ms. Unaisi Baleilevuka). The prosecution did not rely on his cautioned statement or the charge statement at the trial. The only thing that could possibly have stood in the way of his testifying would have been his own reluctance. Moreover, the trial counsel had indeed called one witness for the defense whom the appellant was keen to get to the witness box on his behalf from the inception. Thus, it is not that the appellant had been just a silent spectator at the trial.

[33] On the other hand the mere fact that the trial judge had said that since the appellant did not give evidence there was no evidence from him to contradict the account of the complainant does not necessarily mean that the trial judge would have believed him had he given evidence, for the trial judge had said in the judgment:

[17] The complainant struck me as an honest and reliable witness. I believe her account that the Accused used force and that she did not consent to sexual intercourse. I accept that she said stop or no, but the Accused carried on to have sexual intercourse knowing she did not consent. I feel sure that the complainant did not consent to sexual intercourse and that the Accused knew she did not consent.'

[34] It appears from the summing-up and the judgment that the complainant had been cross-examined at length on the issue of consent, which had centred mainly on the complainant's conduct during and after the incident. There is nothing to suggest that the trial counsel can be found wanting in that respect. It is not surprising that the trial counsel had mostly focused on the complainant's conduct to impeach her evidence on lack of consent as she had stuck to her position from the time of the incident that the sexual intercourse was against her consent.

[35] On the issue of not producing text messages at the trial which primarily demonstrate a previous romantic relationship between the appellant and the complainant, I do not see how they could have taken the appellant's defense that far as to discredit the complainant as she had already admitted their romantic relationship under cross-examination even without those messages. Text messages would have only embellished that position. I cannot see how they could have shown any other or some sort of special relationship going beyond a romantic relationship. On the other hand, it appears that some of those messages would have diluted the defense of consensual sex, if not made it incredible, because in one of the messages the complainant had promptly texted him alleging rape. Therefore, I do not think that one can treat the failure to produce the messages at the trial as evidence of incompetent advocacy. In any event, however deep the intimate previous relationship that the text messages may have demonstrated may have been, that alone would not necessarily negate rape, for there are instances of rape even between *de facto* or *de jure* spouses. Ultimately, it boils down to the question of consent or lack of it and not necessarily the relationship between the appellant and the complainant. Text messages shed little light on that vital element of the offending.

[36] In the circumstances, I do not think that the appellant has a reasonable prospect of success in appeal as far as the ground of appeal based on the alleged incompetence of trial counsel is concerned in as much as the impugned conduct in my view cannot be reasonably construed as having affected the outcome of the trial so as to deprive the appellant of a possible acquittal thereby causing a miscarriage of justice. Nor had the appellant been deprived of a fair trial.

[37] The rest of the appeal grounds are based on the judgment of the trial judge. To start with, it is pertinent to remind ourselves of the principles of law relating to the judge's role in Fiji.

[38] In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) the Court of Appeal stated:

*[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]*

*[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*

[25] *In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.*

[26] *This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide Rokonabete v State [2006] FJCA 85; AAU0048.2005S (22 March 2006), Noa Maya v. The State [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and Rokopeta v State [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].*

02nd and 03rd grounds of appeal

[39] The appellant's criticism is aimed at paragraph 9 of the judgment based on right to silence and reversal of the burden of proof:

'[9] Since the Accused did not evidence, there is no evidence from him to contradict the account of the complainant. This is not a case of his words against her. The entire prosecution case rests on the credibility of the complainant and her evidence.

[40] It is trite law that a sentence of the summing-up or the judgment should not and cannot be singled out for criticism without looking at the totality and the context.

[41] At the outset, the trial judge had directed himself on the summing-up. At paragraph 4-6 of the summing-up the trial judge had correctly addressed the assessors on burden of proof, standard of proof and right to remain silent.

[4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.

[5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty.

[6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.'

[42] In the judgment the trial judge had once again reminded himself of those fundamentals:

[3] I now pronounce the judgment. In doing so I direct myself in accordance with my summing up. I bear in mind that the prosecution carries the burden of proof to establish guilt beyond reasonable doubt. The Accused elected not to give evidence. He carries no burden to prove anything.'

[43] Then, the trial judge had considered the weight of the evidence reflecting on the credibility of the complainant, medical evidence, recent complaint evidence, evidence elicited from the complainant under cross-examination by the defence and that of the defence witness before differing from the opinion of the assessors. The trial judge had fully considered the all-important issue of consent in overturning the assessors' opinion. The reasons given by the trial judge in my view are capable of withstanding critical examination in the light of the whole of the evidence presented at the trial.

[44] Therefore, at paragraph 9 of the judgment the trial judge had merely stated a fact and not shifted the burden or standard of proof or made an adverse inference from the appellant's election to remain silent.

[45] Thus, there is no reasonable prospect of success in these grounds of appeal.

04th ground of appeal

[46] This ground of appeal is based on paragraphs 16 of the judgment and it particularly criticizes the statement that recent complaint evidence negates consent.

[16] The complainant complained to her boyfriend that the Accused had raped her shortly after the incident. Mr Mataibau's evidence is that when that complaint was made the complainant was distressed and crying. The recent complaint evidence adds consistency to the complainant's conduct and negates consent.

[47] What the trial judge had meant by the impugned statement is clear from paragraph 36 of the summing-up where it is stated:

[36]In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant and to negate consent. Consistency on the part of the complainant may help you to decide whether or not the complainant has told you the truth when she said she did not consent to sexual intercourse with the Accused.....'

[48] Thus, there is nothing objectionable in the trial judge's statement because consistency of the complainant's allegation arising from the recent complaint in the end *inter alia* goes to negate consent.

[49] Further, though not specifically adverted to or relied on by the trial judge it appears that the distress of the complainant immediately after the incident may amount to corroboration of her evidence on lack of consent [vide **Soqonaivi v State** (Majority Judgment) [1998] FJCA 64; AAU0008U.97S (13 November 1998), **Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021) and **Tuagone v State** [2021] FJCA 86; AAU136.2018 (31 March 2021)].

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

05th ground of appeal

[51] The appellant's complaint is that the trial judge had not considered several inconsistencies in the complainant's evidence before accepting her to be a credible witness. The appellant's counsel has not elaborated any of the so-called inconsistencies.

[52] Upon a perusal of the summing-up and the judgment I do not find that there had been any material inconsistencies in the complainant's evidence. The applicable test in assessing contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows:

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

[53] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

'[35].....Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;''

[54] This ground of appeal cannot be even considered at this stage for lack of details.

06th ground of appeal

[55] The counsel for the appellant has primarily concentrated on three matters namely the failure of the complainant to run outside the house to raise alarm and the fact that she had not received bodily injuries during the incident despite her fall inside the bathroom and the appellant having behaved aggressively towards her.

[56] The trial judge had clearly adverted to all these matters in the summing-up (see paragraphs 26-32). These aspects appear to have been thoroughly canvassed at the trial under cross-examination by the defence and the complainant's answers had been summarised by the trial judge as follows:

'[32] She explained that she did not run outside to escape because she thought she'll just lock herself in the bathroom. She explained that she was in a state of fear to scream to raise alarm. She agreed that she was little sore from the fall in the shower but she did not sustain any bodily injuries.'

[57] The trial judge once again had ventilated these issues in the judgment as follows:

'[12] The complainant agreed that she did not run outside to raise alarm. However, she explained that she thought she will be safe by locking herself in the bathroom.'

'[15] The complainant's explanations for the lack of bodily injuries are reasonable in the circumstances of this case. The degree of her resistance during the incident was explained on the basis that she was in a state of fear because she knew the Accused was intoxicated and not listening. Her decision to run into the bathroom and not outside to raise alarm is also reasonable in the circumstances. She had to make impulsive decisions without much thought. It would be unreasonable to expect her to react in stereotype reactions when sexually assaulted.'

[58] Thus, it is clear that the matters focused under this ground of appeal had been fully scrutinised at the trial as trial issues. The trial judge was in the best position to decide upon these purely factual matters. It was open to the trial judge to reasonably form the view that he did regarding the matters complained of on the totality of evidence.

[59] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

07th ground of appeal

[60] The counsel for the appellant argues that the trial judge had not taken into consideration the medical evidence and not given the benefit of doubt arising therefrom to the appellant.

[61] The following paragraphs appear in the summing-up on medical evidence:

[37] The third and the final witness for the prosecution was Dr Elizabeth Natasha. Dr Natasha medically examined the complainant on 22 December 2018 at Sigatoka hospital. After examining the complainant she made a written report of her findings, which was tendered by the defence as DE2. During the examination, the doctor obtained history from the patient which is recorded in the report. You must disregard the history when determining the issues in this case. The history was obtained for the purpose of medical examination and therefore it is not evidence of what transpired in this case.

[38] The only significant finding of the doctor was the abrasions on the complainant's genitalia. The doctor said that abrasions are caused by the skin being rubbed away by blunt trauma. The doctor's opinion is that the abrasions on the vagina may suggest recent sexual activity but she cannot say whether the injuries were caused by consensual or non-consensual sex. The doctor also said she did not find any visible bodily injuries on the complainant. She said the probabilities of bodily injury occurring during sexual assault will depend upon the circumstances such as the nature of fall and surface of the fall.

[39] The medical evidence of course is not conclusive. It does not prove that the sexual intercourse between the Accused and the complainant took place without the consent of the complainant. However, the evidence is before you, and it is matter for you to decide whether the evidence supports the complainant's account of force was used during sexual intercourse.'

[62] At paragraphs 13 and 14 the trial judge had further considered the doctor's evidence:

[13] The complainant agreed that she did not sustain bodily injuries during the incident despite the Accused being aggressive towards her. Apart from the fall inside the bathroom she did not say that the Accused used physical violence on her causing her bodily injuries.

[14] The medical evidence is not conclusive. The complainant was medically examined on the same evening following the incident on 22 December 2018. The examining doctor found abrasions on the complainant's genitalia but the doctor could not say if those injuries were caused by non-consensual sex. The medical evidence of lack of bodily injuries is consistent with the complainant's account that she felt little sore from the fall in the bathroom but she did not sustain any visible injuries.'

[63] The fact that medical evidence is inclusive means that it neither supports nor rejects an act of forceful sexual intercourse. Therefore, it cannot cast a reasonable doubt on the complainant's evidence that sexual intercourse was non-consensual. Thus, whether the act of sexual intercourse was against her consent or not totally depended on the testimony of the complainant and not on medical evidence.

[64] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

08th ground of appeal

[65] The appellant's contention is that the trial judge had not given cogent reasons as to why he overruled the assessors' opinion.

[66] When the trial judge disagreed with the assessors his duty was to embark on an independent assessment and evaluation of the evidence and give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [see **Fraser v State** (supra)]

[67] The counsel submits that the trial judge had not given reasons why he disagreed with the assessors' view of not accepting the complainant's testimony on her failure to raise an alarm. This argument is misconceived. The trial judge had certainly given cogent reasons why he was convicting the appellant.

[68] The assessors were not required to give reasons for their opinion and therefore it is not known why they came to form the opinion of not guilty. Thus, the trial judge

could not address his mind to imaginary reasons. All what he could do was to independently come to his findings which he had done and in the matter of ‘raising alarm’ the trial judge had stated in the summing-up and the judgment respectively as follows:

‘[32]*She explained that she did not run outside to escape because she thought she’ll just lock herself in the bathroom. She explained that she was in a state of fear to scream to raise alarm. She agreed that she was little sore from the fall in the shower but she did not sustain any bodily injuries.*’

‘[15]*Her decision to run into the bathroom and not outside to raise alarm is also reasonable in the circumstances.*’

[69] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

09th ground of appeal

[70] Under this ground of appeal which is more or less similar to the 06th ground of appeal the appellant’s counsel submits that the trial judge had not adequately considered ‘serious doubts’ in the prosecution case. He also once again refers to the medical report already dealt with earlier. The only other so-called serious doubt pointed out is the evidence of the complainant that ‘*she was upset with the Accused leaving her in the bathroom after sexual intercourse without giving a towel*’. However, once more the appellant’s counsel (in a manner which I think is quite unbecoming of an appellate counsel) had selectively quoted this part from the total sentence. The complete sentence is ‘*....She rejected the proposition that she cried out rape because she was upset with the Accused leaving her in the bathroom after sexual intercourse without giving a towel. Evidence is the answer of the complainant and not the proposition put in the question to the witness*’ (see paragraph 11 of the summing-up)

[71] This appeal ground is devoid of any merits.

10th ground of appeal

[72] The appellant's counsel argues that the trial judge's reference to the complainant's family at paragraph 11 of the judgment when no family member had given evidence is new evidence raising a new theory on the facts. To say the least, this is a rather perplexing contention.

[73] All what the trial had said at paragraph 11 is as follows:

'[11] The cross-examination centred mainly on the complainant's conduct during the incident and after the incident. The complainant agreed that she chose to stay back alone with the Accused on the day of the incident. However, she explained that she and her family trusted him.'

[74] The trial judge had not invented anything new but merely narrated what the complainant had said in evidence which was not hearsay. It is not surprising that the complainant's family trusted the appellant as he was known to be a rugby star and presumably self-discipline and trust had to be part and parcel of such a sportsman representing the country.

[75] There is no merit in this ground of appeal.

11th ground of appeal

[76] The appellants' counsel criticises the trial judge's comments at paragraphs 6 that *'I do not think Mr Katonibau's meeting with the complainant at the eatery was a coincident'*.

[77] Not for the first time the counsel is guilty of selectively taking only a sentence out of a whole paragraph and its context. The full paragraph is self-explanatory of the judge's legitimate inference drawn from facts which is part of a trial judge's function.

'[6] Mr Katonibau is a close friend of the Accused. I accept his evidence that he visited the Accused on 23 December 2018 at the police station and

then met with the complainant at an eatery. This meeting occurred a day after the incident. Mr Katonibau gave the Court an impression that his meeting with the complainant was a coincidence when he ended up at the same location as the complainant shortly after learning of the predicament of his friend, the Accused. I do not think Mr Katonibau's meeting with the complainant at the eatery was a coincident. His story does not add up when he said the complainant told him she consented to sexual intercourse with the Accused and that on her request he took her back to the police station for her to withdraw her report. He remained in the vehicle when she went inside the station and when he learnt that the report could not be withdrawn he did not see fit to inform the police what the complainant had allegedly told him about her consenting to sexual intercourse. His failure to inform the police of the conversation he had with the complainant supports her account that he was putting pressure on her to withdraw her report.'

[78] There is no merit in this ground of appeal.

12th ground of appeal

[79] The foundation of the argument under this ground of appeal is based on the evidence of defence witness who had said that he remained in the vehicle when the complainant went inside the police station and came back and told him that that the complaint could not be withdrawn.

[80] However, the complainant's evidence was completely different as stated at paragraph 07 of the judgment where she had consistently denied ever trying to withdraw the complaint and in fact she had vowed to pursue it all the time.

'[7] The complainant's evidence is that she had a conversation with Mr Katonibau on 23 December 2018 and that it was Mr Katonibau who tried to convince her to drop the case against the Accused. Her evidence is that she told Mr Katonibau she was going ahead with the case and she told the same to the Accused's mother when she met her at the police station later that afternoon.'

[81] The trial judge had not believed the defence witness but believed the complainant's version. Therefore, there was no need for the trial judge to further analyse the defence witness's discredited account.

[82] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

Law on bail pending appeal

[83] 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."*

[84] 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).

[85] 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.'

[86] 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).'

[87] 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'*

[88] In **Ourai** 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...."

[89] 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"*

[90] **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."*

[91] 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 solely on ‘exceptional circumstances’ such as extremely adverse personal circumstances including extremely advanced age and serious medical conditions when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[92] 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.

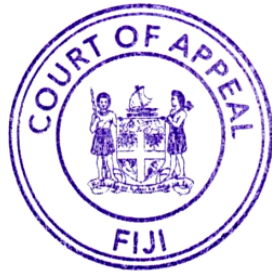
[93] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances judicially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

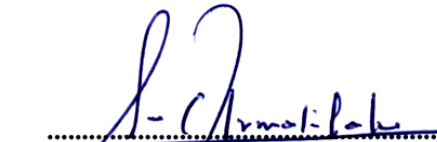
[94] Since I have already decided that the appellants’ appeal against conviction has no reasonable prospect of success his conviction appeal obviously fails to reach the higher threshold of ‘very high likelihood of success’. Therefore, it is not necessary to consider other two factors under section 17(3). The appellant has not demonstrated any judicially recognizable exceptional circumstances independent of section 17(3) considerations in the form of extremely adverse personal circumstances either.

[95] Therefore, the appellant’s application for bail pending appeal fails and stands rejected.

Orders

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




.....
Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL