

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

**CRIMINAL APPEAL NO.AAU 139 of 2019**  
**[In the High Court at Labasa Case No. HAC 30 of 2017]**

**BETWEEN** : **JONE COLATA**

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

**Coram** : **Prematilaka, RJA**

**Counsel** : **Mr. M. Fesaitu for the Appellant**  
: **Mr. R. Kumar for the Respondent**

**Date of Hearing** : **07 December 2022**

**Date of Ruling** : **15 December 2022**

**RULING**

[1] The appellant had been indicted [with another – 01<sup>st</sup> accused and appellant in AAU 116 of 2019] in the High Court at Labasa with two counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Taveuni in the Northern Division on 8 July 2017.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 03 August 2018 to an imprisonment of 14 years (after the remand period was deducted and discount given for good behavior the sentence is 12 years and 06 months) each for two counts of rape both sentences to run concurrently with a non-parole period of 09 years.

[3] I allowed enlargement of time (EOT) to appeal against conviction (EOT on sentence was refused) by the Ruling on 12 October 2021 [**Colata v State** [2021] FJCA 167; AAU139.2019 (12 October 2021)] primarily on the issue of identification of the appellant by the complainant by his voice, body type or shape and distinctive bad body odour (see paragraphs 19-24 of the summing-up) as the person who was standing outside the vehicle talking to the co-accused who was already on top of her and then raped her after the co-accused stepped aside. There had not been a subsequent voice identification parade. No Turnbull directions were given too.

[4] While allowing enlargement of time to appeal against conviction I, however, said:

*'[17] In the circumstances, though I cannot assess the degree of success of this ground of appeal at this stage as the final outcome will depend on the assessment of the totality of evidence by the full court, upon reading the complete trial proceedings, I think the aspect of identification or recognition by voice and by other means such as body shape, distinctive bad body odour would need closer attention by full court for future guidance.'*

[5] Since then the Court of Appeal had the occasion to discuss voice identification in **Tubuduadua v State** [2022] FJCA 44; AAU120.2016 (26 May 2022). Thus, it is for the full court to consider the appellant's appeal against conviction in the light of this decision and also the effect of body type or shape and distinctive bad body odour of an accused in the matter of identification.

#### **Law on bail pending appeal**

[6] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very

high likelihood of success in appeal. However, appellants can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Ourai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [7] 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 direct relevance, practical purpose or result.
- [8] 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 may 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’.
- [9] The appellant satisfied this court that he deserved to be granted EOT to appeal against conviction but I cannot say that he has a very high likelihood of success in his appeal against conviction for the reasons given in the EOT Ruling and in view of **Tubuduadua v State** (supra) without examining the full record.
- [10] I shall also consider the second and third limbs of section 17(3) of the Bail Act namely ‘(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard’ together.


[11] The appeal is likely to be taken up before the full court in the not so distant future as the complete appeal records are already served on both parties who have tendered written submissions for the full court hearing. This appeal is now ready to be listed on a call over date to fix a date and time for full court hearing.

[12] Therefore, I am not inclined to allow the appellant's application for bail pending appeal and release him on bail pending appeal at this stage.

**Order of the Court:**

1. Application for bail pending appeal is refused.



  
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**Hon. Mr. Justice C. Prematilaka**  
**RÉSIDENT JUSTICE OF APPEAL**