

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

**CRIMINAL APPEAL NO. AAU 113 OF 2023**  
**[Lautoka High Court: HAC 080 of 2019]**

**BETWEEN** : **ELIKI KAE** *Appellant*

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

**Coram** : Qetaki, RJA

**Counsel** : Ms. L. Volau for the Appellant  
Ms. M. Konrote for the Respondent

**Date of Hearing** : 23 September, 2025

**Date of Ruling** : 16 December, 2025

**RULING**

**(Bail Pending Appeal)**

**(A). Background**

[1] The appellant had been charged with a single count of rape under the Crimes Act 2009.  
The charge was as follows:

**Statement of Offence**

**Rape:** Contrary to section 210(1) and (2) (a) of the Crimes Act 2009

### **Particulars of Offence**

**Eliki Kae** on the 21<sup>st</sup> day of December 2018, at Lautoka in the Western Division penetrated the vagina of **Tavaita Senibai** without her consent.

- [2] The High Court Judge found the appellant guilty of rape. On 31 October 2023, the appellant was sentenced to 9 years imprisonment with a non-parole period of 7 years.
- [3] The appellant appealed (In Person) against conviction and sentence. He tendered an application abandoning his sentence appeal in Form 3 on 22 March 2024, which was allowed after the Court verified his intention in light of **Masirewa v State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010).
- [4] At the leave stage the learned single Judge (Prematilaka, RJA) allowed leave to appeal on all grounds.

### **(B). Grounds of Appeal**

- [5] The following grounds were urged:

**Ground 1:** *That the learned trial Judge erred in law and in fact in holding that the inconsistencies in the complainant's evidence did not affect the weight of her evidence given her mental capacity of being a slow person whereas*

- (i) The prosecution did not try its case on the basis that the complainant did not have the necessary capacity to give consent;*
- (ii) The complainant's conduct as to the events should not be taken as relevant to her being a mentally slow person;*
- (iii) The manner in how the complainant responded to being questioned in the trial is inconsistent to such finding of her being mentally slow; and*
- (iv) The observation made by the learned trial Judge is not supported by expert evidence.*

*Therefore causing a substantial miscarriage of justice.*

**Ground 2:** *That the learned trial judge had not properly accounted and evaluated the inconsistencies and implausibility in prosecution's case therefore making the conviction unreasonable.*

**Ground 3:** *That the learned Judge erred in finding that the complainant and the two prosecution witnesses had testified to the truthfulness of the complaint.*

**(C). The Law**

[6] A Judge of this Court is empowered to admit an appellant to bail under section 35(1) (d) of the Court of Appeal Act.

[7] The Bail Act 2002 is an Act to make provisions for the granting of bail.

[8] Section 17 of the Bail Act 2002 is the general provisions for bail determination, and of particular importance is subsection (3) of section 17 which states:

*“(3) 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 the success of the appeal;*

*(b) the likely time before the appeal hearing;*

*(c) the proportion of the original sentence which will have been served by the applicant when the appeal is heard.”*

**(D). Facts**

[9] The facts of the case are that the victim was residing at her uncle's house as her parents were abroad. The appellant had been a frequent visitor to her house. He had reason to believe that the victim is a person with slow mentality. Having waited for her uncle and aunt to leave for church the appellant entered her house drunk without permission. He pulled her into her uncle's room and started to assault her by slapping and closing her mouth. The appellant forcefully took her clothes off holding her down tightly. The appellant penetrated her vagina forcefully with his penis. She started crying but

the appellant told her to be quiet, and covered her mouth and warned her not to respond when her cousin was calling from outside.

**(E). Appellant’s Case**

[10] The appellant submits that his appeal has a high likelihood of success. He submits that it is evident from the leave ruling that all the grounds of appeal against conviction for which leave has been granted, has a reasonable prospect of success. The full Court of Appeal will make the final determination on the merits of the appeal.

[11] The appellant had served approximately 1 year and 11 months of the sentence imposed by the High Court on the day of filing of submissions, 9 September 2025. It is uncertain at this stage as to when the hearing of the appeal will occur. As such, the Appellant would have served a great portion of his sentence by the time the appeal is determined.

[12] The appellant submits that the factors to be determined by the Court was explained in **Vualili v State** [2021] FJCA 91; AAU0009.2018 (7 April 2021), per Prematilaka, RJA, as follows:

*“[17] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on “exceptional circumstances” including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3).*

*[18] 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.*

*[19] If the appellant cannot reach the higher standard of “very high likelihood of success” for bail pending appeal, the court need not go on*

*to 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”.*

[13] The appellant submits that the factors to be considered under section 17(3) of the Bail Act 2002 has been met by the Appellant for bail to be granted pending the full determination of the appeal.

**(F). Respondent’s Case**

[14] The respondent submits that the observations made in a recent and relevant case, in **Naikalivou v State** [2024] FJCA 63; AAU017.2022 (26 March 2024), paragraphs [22] – [25] sets out the matters to be considered by an appellate court when considering an application for bail

***(i) Likelihood of success in his appeal***

[15] The respondent referred to paragraphs [14] and [15] of the leave ruling, with regard to the question before the appellate court, as follows:

*“[14] .....To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant’s guilt. The same test could be applied mutatis, mutandis to a trial by a judge alone. (without assessors) or a Magistrate,*

*[15] While giving due allowance for the advantage of the trial Judge in seeing and hearing the witnesses, the Full Court has to evaluate the evidence and make an independent assessment thereof to decide whether the trial judge could have reasonably convicted the appellant on the evidence before him.”*

[16] The respondent submits that should the appeal records (transcripts) be available it will include the full evidence of PW1 and PW3 who, apart from speaking of recent

complaint by PW1, testified about her physical distress at the material time when they had been calling out to her. This aspect of (distress) evidence was not a focal point of the leave ruling, however, considering the totality of the evidence at trial vis a vis the undisputed fact that PW1 is differently abled, it was reasonably open to the trial judge to have convicted the appellant based on PW1's evidence.

[17] The respondent submits that the grant of leave does not mean that the appellant's conviction would inevitably be quashed following the full Court hearing. Because the proviso could also be applied if the quality of the recorded evidence were to provide the Full Court with a convincing and unimpeached narrative of the prosecution's case.

[18] The respondent submits that overall, while it is accepted that there may appear a reasonable prospect of success with the conviction appeal, it is not guaranteed that the appellant will be successful. Without the availability of the appeal records (transcripts), this factor cannot be explored with certainty. The appellant's conviction and sentence remain lawful, and since an appellate court must give due allowance to the Trial Court for having had the advantage of having seen and heard the witnesses before deciding guilt, at that time, it cannot be said that the appellant has a likelihood of success (high or otherwise) but only a reasonable prospect of success. This limb is not satisfied.

(ii) **Time lapsing before the court hearing**

[19] The respondent submits it will always refute any attempt to put the blame of delay on the Court of Appeal., because through experience, the Court works tirelessly to ensure that all appellants receive timely and meaningful hearings.

[20] The respondent submits, it is now the duty of appellant counsel to attend to this appeal record preparation, as per the provisions of the Court of Appeal Act and Rules, and no fault can be laid against the Court if the record preparation is being delayed.

[21] The leave ruling was delivered on 14 August 2024. Over one year later this application for bail pending appeal was filed, as of now the record preparation has not been completed. The delay is not the fault of the Court. Transcripts may take some time however, the delay here is not egregious.

[22] The respondent submits that, it cannot be reliably said that the appellant has faced or will face undue delay in this case because if his appeal records (currently in draft) are finalized (with transcripts) without further wait, he would likely have the full court hearing possibly in 2026.

*(iii) Portion of the original sentence having been served by the appellant*

[23] The respondent submits that, as the appellant was sentenced on 31 October 2023, he had served over 1 year 10 months and 23 days. Factoring the time in remand of 1 year and 6 months, the appellant has collectively been in prison for approximately 3 years 4 months and 23 days.

[24] The respondent submits that despite this being a 2023 appeal, if the matter is ready for hearing, surely it may be called over sooner, rather than later for future hearing fixtures before the full Court.

[25] The appellant may have served a third of his sentence by now, however, his crimes remain as proven, until decided otherwise by the full Court, so the sentence is neither unlawful nor unreasonable. This factor is not actually persuasive at this stage for bail pending appeal to be granted.

[26] Finally, the respondent submits that the appellant's case does not show any exceptional circumstances warranting the grant of bail pending appeal.

**(G). Analysis**

[27] For an application for bail pending appeal, the onus is on the appellant to demonstrate that his case meets the requirements specified in section 17(3) of the Bail Act 2002. Both parties relied on their written submissions. The appellant is firm on his assertion that the appeal has a likelihood of success, based on the reasoning of the learned Single Judge at the leave stage, who had allowed leave on all the grounds of appeal urged by the appellant.

[28] The respondent is evidently opposed to the application stating that the appellant's case, fall short of meeting the requirement of each of the three limbs of section 17(3) of the Bail Act 2002. Further, that the appellant's case does not show any exceptional circumstances warranting the grant of bail.

[29] The appellant has referred to **Vualili v State** (supra) submitting that the factors are to be determined with the principles or guidelines set out in paragraphs 17 – 19 of the ruling in that case. The respondent has referred to **Naikalivou v State** (supra) for the same reason, especially relying on paragraphs [22] – [24]. Both these cases were before the same learned Single Judge. There is therefore no dispute on what principles is to be followed, and on the fact that the appellant’s grounds were all allowed at the leave stage. Having read the rulings in the two cases (above), I am confident that the propositions and guidelines have been based on relevant case law that are often cited in applications for bail pending appeal Fiji-wide. There is no need to refer to other similar authorities. I am of the opinion that in this case there is not only a likelihood of success, but more, as the appeal has very great likelihood of success, satisfying the independent requirement of “exceptional circumstance”.

[30] The appellant is granted bail pending appeal upon conditions that are set out in the orders below.

### **Order of Court**

1. *The appellant’s application for bail pending appeal is granted upon the following conditions:*
  - (a) *The appellant shall provide 2 sureties who are to submit sufficient and acceptable documentary proof of their identity.*
  - (b) *The appellant is to reside with **Sereima Sauira** of Qaranivalu Road, Kalabu at her home of the same address.*
  - (c) *The appellant is to report to the Valelevu Police Station, Nasinu Township weekly on Fridays between the hours of 6am to 6pm.*
  - (d) *The appellant is not to be relocated to another residence or out of the Kalabu and Nasinu Township boundaries without informing the Station Officer, Valelevu Police Station before moving residence or travelling outside the Kalabu and Nasinu Township boundaries.*

- (e) *The grant of bail pending appeal will automatically be revoked on breach of any or all of the above conditions.*



A handwritten signature in black ink, appearing to be "Alipate Qetaki", written over a horizontal line.

**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent