IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0044 of 2015

[High Court Case No: HAC200 of 2013]

BETWEEN : **TARAJIANI BAVESI**

Appellant

AND : **THE STATE**

Respondent

Coram : Hon. Mr Justice Daniel Goundar

Counsel : Mr S Waqainabete for the Appellant
Mr S Vodokisolomone for the Respondent

Date of Hearing : 17 October 2017

Date of Ruling : 27 October 2017

RULING

[1] This is an application for bail pending appeal. The State opposes the application.

[2] Following a trial in the High Court at Suva, the appellant was convicted of four counts of rape and sentenced to 13 years' imprisonment with a non-parole period of 12 years. On 19 June 2017, I granted the appellant leave to appeal against conviction. The grounds on which the appellant was granted leave in summary are:

- The learned trial judge's reasons for disagreeing with the unanimous not guilty opinions of the assessors are not cogent.

- The learned trial judge erred in law to admit the hearsay evidence contained in the medical report of the victim.

[3] The application for bail was filed by the appellant in person. At the hearing, the application was argued by counsel. Counsel submits that this appeal has a high chance of success and that the appellant has exceptional circumstances, namely, that his immediate family (wife and children) are financially depended on him for support.

[4] In considering this application for bail, I bear in mind that the test for bail pending appeal is more stringent than the test for leave. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. Section 17(3) of the Bail Act 2002 specifically requires the court to consider the following factors when considering bail pending an appeal:

(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.

[5] The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015).

[6] The grounds of appeal were assessed in the leave ruling as follows:

> Grounds one to three can be dealt with together because they concern lack of cogency in the reasons the trial judge gave to convict the appellant. It is well established that an appellate court reviews the trial judge's reasons for disagreeing with the majority opinion of the assessors for cogency. The reasons must be carefully stated in a written judgment and reflect the trial judge's views as to the credibility of witnesses and other considerations (*Ram Bali v R* [1960] 7 FLR 80, 83). They must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the

trial (*Setevano v State* unreported Cr App No 14 of 1989; 27 May 1989, 7). In *Roko & others v State* unreported Cr. App. No. 5 and 12 of 2002; 29 April 2004, the principle regarding the trial judge's obligation to give cogent reasons for not agreeing with the majority opinion of the assessors was endorsed by the Full Court at p 15:

> *The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.*

In the present case, the trial judge gave brief reasons for disagreeing with the unanimous not guilty opinion of the assessors. The judgment consists of ten paragraphs. In paragraph one, the trial judge sets out the assessors' opinions and a possible explanation for those opinions. In paragraphs two to four, the trial judge sets out the law regarding the function of the assessors and the role of the judge by reference to the statutory provision and case law. In paragraph six, the trial judge remarks that the assessors' verdict was not perverse and that it was open to them to reach such conclusion on the evidence, but immediately after making that statement, he disagrees with the assessors' opinion based on his own assessment of the evidence and the credibility of the witnesses. Both parties agree that there is an apparent contradiction in the trial judge's reasoning that on one hand, the unanimous not guilty opinion was open on the evidence, while on the other hand, it was not, based on the judge's assessment of the evidence.

The actual assessment of the evidence was carried out in three paragraphs – seven to nine. Paragraph 10 sets out the conclusion that the appellant was guilty of the charges. I have carefully looked at the trial judge's reasons for convicting the appellant. The main issue in the trial was consent or lack of it. On the issue of consent or lack of it, the trial judge believed the complainant and not the appellant. The reason that the trial judge gave for not believing the

appellant on the issue of consent was that it was ethically wrong for him to have sex with suspects he was investigating for an alleged crime. This reasoning is arguably flawed in law. The appellant was not charged with breach of police ethics. He was charged with rape. The appellant's admission that he had engaged in sexual acts with the complainants may have been unethical police behaviour, but that does not mean that he did not tell the truth when he said the sexual acts were consensual. Overall, I am satisfied that it is reasonably arguable that the trial judge's reasons may not withstand critical examination in the light of the whole of the evidence presented in the trial. I would grant leave on grounds one to three.

Admissibility of the medical report involves a question of law alone. On ground four, the appellant may proceed as of right under section 21(1) (a) of the Court of Appeal Act..

[7] Indeed, there was an obligation on the trial judge to give cogent reasons to disagree with the unanimous not guilty opinion of the assessors in order to convict the appellant. At this stage, there is a possibility that the trial judge's reasons may not withstand critical examination in the light of the whole of the evidence. However, I am not convinced that the result is certain to satisfy the high likelihood of success test. Even if the appellant succeeds with his appeal, the relief will be a retrial and not an acquittal.

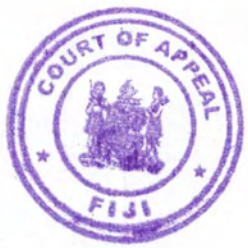
[8] There are about seventy criminal appeals that are awaiting hearing before the Full Court. This appeal is unlikely to be heard before 2019. The appellant was sentenced on 27 March 2015. By 2019, the appellant will have served about 4 years of his sentence of 13 years imprisonment. That period in my view is not substantial to grant bail.

[9] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). The appellant submits that he is the sole bread winner for his wife and children. However, personal or family circumstances are not exceptional circumstances to grant bail.

[10] For these reasons, the application for bail fails.

Result

[11] Bail refused.



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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Director of Legal Aid for the Appellant
Office of the Director of Public Prosecutions for the Respondent