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

CRIMINAL APPEAL NO.AAU 129 of 2016
[In the High Court at Suva Case No. HAC 063 of 2013L]

BETWEEN	:	**LIVAI KAIVITI RATABUA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**26 May 2020**
Date of Ruling	:	**04 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of murder contrary to section 237 of the Crimes Decree, 2009 committed on 07 January 2013 at Suva in the Central Division.

[2] The information on the count of murder was as follows.

Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

LIVAI KAIVITI RATABUA *on the 7th day of January 2013, at Lautoka in the Western Division murdered* ***MACIU BAKANI.***

[3] After full trial, the assessors had expressed a unanimous opinion of guilty against the appellant for murder on 13 July 2016. The learned High Court judge had agreed with the assessors and convicted the appellant of murder in his judgment on the same day. He was sentenced on 14 July 2016 to life imprisonment with a minimum serving period of 15 years.

[4] The appellant being dissatisfied with the conviction had by himself filed a timely notice of appeal on 14 July 2016 (re-submitted twice or thrice later) only against conviction. The appellant's written submissions had been received by the registry on 16 February 2018. Two additional grounds of appeal against conviction and submissions thereon had been tendered on 11 May 2018. An application for bail pending appeal and submissions had reached the registry on 18 October 2018. Further submissions on the application for bail pending appeal had been filed on 29 November 2018. The state had filed written submission on 19 March 2019 and supplemental written submissions on 17 July 2019.

[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 for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019).

Law on bail pending appeal

[6] 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.*
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> *[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.*
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> *[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:*
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> > *"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;*
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> > *(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."*
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> *[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 circumstanees 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."*

[7] 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)

[8] 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.'*

[9] 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).*
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> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[10] 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'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] 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 ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting **bail pending appeal** as established by cases by Fiji is that it may only be granted where there are exceptional*

circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."

[14] 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) of the Bail Act.

[15] 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.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[17] The evidence of the case is summarised by the learned trial judge as follows.

THE PROSECUTION'S CASE

"16. The prosecution's case were as follows. On 7 January 2013, between 4 pm and 7 pm, the accused (DW1), Elia (PW1), the deceased and one Navitalai were drinking liquor near Balawa Cemetery in Lautoka. They were drinking rum, that is, three bottle of 26 ounce rum. At about 9 pm, Elia returned home with the deceased and the two continued drinking at Elia's house. The accused

also joined the two a while later. An argument erupted between Elia and his wife.

17. According to the prosecution, the deceased took Elia's side during the argument, while the accused took Elia's wife's side in the argument. Elia and the deceased later "ganged up" on the accused and later jointly assaulted him. The parties were somewhat related. The accused however managed to free himself and fled to Navutu Village. He later returned to the scene with one Etonia Bose. The accused told Bose about Elia and the deceased jointly assaulting him. At the scene, the accused repeatedly swore at the deceased. There was bad blood between the two.

18. According to the prosecution, the deceased approached Bose and the accused. The deceased threw a punch at Bose. Bose avoided the punch and countered with a right hand punch to the deceased's nose and mouth. The deceased fell backwards with his head hitting the ground. According to the prosecution, the deceased tried to get up from the ground. The accused suddenly appeared and stomped four times on the deceased's head, while simultaneously delivering three kicks to his forehead. According to the prosecution the stomps and the kicks were hard ones. The deceased was unconscious and bleeding severely from the head.

19. Bystanders stopped the accused from further assaulting the deceased. The deceased was later taken to Lautoka Hospital. He died 10 minutes after arriving at the hospital. On 8 January 2013, the day after the accused's alleged assault, a post-mortem was done on the deceased. Visible external injuries were found on the deceased's forehead, right side of the head, middle of the head and on the left ear region. The cause of death was "compression of medulla oblongata" (brain injuries) due to assault. The matter was reported to police. An investigation was carried out. Accused was caution interviewed by police on 8 and 9 January 2013. He admitted stomping and kicking the deceased on the head at the material time. On 10 January 2013, the accused appeared in the Lautoka Magistrate Court charged with murdering the deceased on 7 January 2013."

THE ACCUSED'S CASE

22. The defence's case was very simple. The accused (DW1) admitted he was at the crime scene at the material time. He admitted he was with Etonia Bose at the material time. He admitted he swore at the deceased before he confronted them. He admitted Bose punched the deceased on the right jaw at the material time, wherein he fell to the ground. He admitted he then kicked and stomped on the deceased when he was lying on the ground. He admitted he kicked and stomped on the deceased's right hip, mid-section and left shoulder. He admitted he kicked the deceased on the chest and twice on the stomach.

23. Note that Doctor Gounder (PW9), the pathologist who conducted the post mortem on the deceased on 8 January 2013 at Lautoka Hospital, found no injuries on the deceased, on the areas that the accused said he stomped and kicked on. Doctor Goundar found the deceased largely injured on the forehead, the right side of the head, left ear region and middle of the head. So, it would appear that the accused's case was that his assaults on the deceased did not cause his death. In his evidence, he appeared to deny kicking and stomping on the deceased's head, at the material time. As a result, he appeared to be saying he was not liable for the deceased's murder.

24. In his police caution interview statements, which were tendered as Prosecution Exhibit 2 (A) and 2 (B), the accused was said to have admitted stomping and kicking the deceased's head, when he was lying on the ground, at the material time. The accused asks you to disregard his alleged admissions because these were police fabrications. He said, he did not give the above admissions. As a result of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged and acquit him accordingly. That was the case for the defence.

[18] The appellant's written submissions have raised issues different to the grounds of appeal stated in the initial notice of appeal. Those issues have not been crystallised as separate grounds of appeal. They consist of matters relating to provocation, intoxication, retaliation, recklessness and the young age of the appellant. The appellant argues that one, more or all of them should have brought the conviction of murder down to one of manslaughter or grievous hurt. I shall deal with them separately for clarity.

Ground One

'The learned trial judge has failed to direct the assessors on provocation and intoxication that were available on evidence.'

[19] The appellant argues that had the learned trial judge directed the assessors on provocation and intoxication that arose from evidence negating the fault element of murder namely the intent to cause death, the verdict of murder may have been reduced to one of manslaughter or causing grievous hurt.

[20] Unfortunately for the appellant the evidence does not reveal sufficient evidence for the learned trial judge to address the assessors on provocation. In **Praveen Ram v State** (2012) FJSC 12; CAV0001.2011 (9 May 2012) the Supreme Court held as follows:

> *"This authority recognizes the acute practical dilemma facing a defendant who may have an arguable defence of provocation, giving possible ground to support a conviction of manslaughter instead of murder, but who chooses to deny the participation in the killing altogether. Justice requires that consideration be given to a possible defence disclosed by the evidence even if, for reasons good or bad, the defendant chooses not to advance it. Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose self-control and act as he did." (emphasis added)*

[21] In **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) the Court of Appeal analysed several previous decisions of the Court of Appeal and the Supreme Court on the issue of provocation and in my view, the appellant's case falls far short of the requirements laid down for a plea of provocation to be placed before the assessors and succeed.

[22] In **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) the Court of Appeal dealing with intoxication held

> *"[22] Like provocation, voluntary **intoxication** is not an excuse for an unlawful killing. But voluntary **intoxication** is relevant in determining whether the accused had the pre-requisite fault element to be guilty of murder. Section 31 (1) of the Crimes Act 2009 states that if any part of a defence is based on actual knowledge or belief, evidence of **intoxication** may be considered in determining whether that knowledge or belief existed."*

[23] Like in the case of provocation, I do not think that there was sufficient evidence warranting any direction on intoxication in this case and in my view, the same observations in ***Ram*** would apply to intoxication as well *i.e.* before the judge can properly invite the jury to consider a defence of intoxication, there must be sufficient evidence fit for the jury's consideration as to whether the appellant entertained any of the fault elements of murder when he executed the physical act.

[24] In this case the appellant's defence was that he did not stomp the deceased's head but only other parts of the body and therefore did not contribute to the fatal injuries. Thus, in that factual context, intoxication need not have been considered in determining whether the appellant entertained any fault element in relation to the offence of murder.

Ground Two

[25] The appellant seems to argue that even if it could be accepted that he had stomped the deceased's head he could not be held to have been reckless in causing the death of the deceased leave aside the intention to cause death.

[26] In the light of the fact that the prosecution had run its case on the premise that the appellant was reckless as to causing the deceased's death, the learned trial judge had correctly put to the assessors the fault element of recklessness in the offence of murder in paragraphs 12, 13 and 36 of the summing-up and directed them in paragraph 14 to consider (if they do not find him guilty of murder) the lesser offence of manslaughter, as now contended by the appellant, based on his intention to cause serious harm or being reckless as to causing serious harm to the deceased. The assessors had decided that the appellant was reckless as to causing the death of the deceased and the learned trial judge had agreed with them that the appellant had been reckless in causing the death of the deceased in paragraph 5 of the judgment.

[27] In the circumstances, I cannot see a reasonable prospect of the appellant succeeding on this ground of appeal at this stage. If at all, it is only the Full Court that can examine the issue aided by the complete appeal record as to whether the appellant was being reckless only as to causing serious harm to the deceased as opposed to the appellant having been reckless as to causing the death of the deceased.

Ground Three

[28] The appellant argues that at 18 years of age at the time the offence was committed, he was not aware that he was taking an unjustifiable risk that the deceased would die due to him being stomped and kicked on the head.

[29] However, the appellant was obviously not of such a tender age as not to understand the natural consequences of his acts or not to know the risk involving in his act of stomping and kicking the head of the deceased. Thus, no directions on this line of argument were required. This ground has no merits.

Additional grounds

Ground Four

> *'The summing-up lacks essential qualities of objectivity and even-handedness.'*

[30] The appellant argues that the learned trail judge had not delivered the summing-up in a fair, objective and balanced manner and particularly complains of paragraphs 31 and 33 of the summing-up. He cites the following observations in **Tamaibeka v State** [1999] FJCA 1; AAU0015u.97s (8 January 1999) in support of his contention.

> *'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge'*

[31] I have examined the impugned paragraphs and the summing-up in its totality carefully but cannot find that the trial judge is in violation of the above observations in ***Tamaibeka***. This ground has no merit.

Ground Five

> *'The learned trial judge erred in law when His Lordship misdirected the assessors by shifting the burden of proof on the appellant to prove his innocence.*

[32] The appellant refers to paragraphs 4 and 41 on the one hand and 2 and 40 on the other of the summing-up to advance his argument that in the latter two paragraphs the learned trial judge had shifted the burden away from the prosecution. They are as follows.

'4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

41. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

2. .....It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

40. There were 9 witnesses for the prosecution and 3 witnesses for the defence. You will have to consider all the evidence together. You will have to compare them and analyse them together. You have heard and watched the witnesses give evidence in the courtroom. You had observed their demeanour. Who do you think was forthright as a witness? Who do you think was evasive as a witness? Who do you think is the credible witness? Who do you think, from your point of view, was telling the truth? If you accept the prosecution's witnesses as credible, and you accept their version of events, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.'

[33] I do not agree with the appellant's contention. To me, paragraphs 4 and 41 deal with the burden of proof and standard of proof and there is no error at all. Paragraphs 2 and 40 of the summing-up deal with reliability and credibility of witnesses. Thus, this ground of appeal has no reasonable prospect of success.

[34] In any event, there is nothing to indicate that the counsel for the appellant had sought any redirections on the matters of alleged non-direction or misdirection complained of. Therefore, the appellant is not even entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].This ground has no merit.

[35] Further, on what basis the appellate court could interfere with the decision of the assessor and that of the judge in a situation like this has not been demonstrated by the appellant. In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal said

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
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> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[36] Therefore, there is no reasonable prospect of success in the appellant's appeal against conviction and therefore, logically no 'very high likelihood of success' exists either.

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

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL