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

CRIMINAL APPEAL NO.AAU 0050 of 2019
[In the General Court Martial in GCM case No. 03 of 2018]

BETWEEN	**:**	**JOSEFA TIKOIKADAVU TUNIDAU**
		Appellant
AND	**:**	**THE REPUBLIC OF FIJI MILITARY FORCE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. A. Paka for the Respondent**
Date of Hearing	**:**	**19 March 2021**
Date of Ruling	**:**	**11 June 2021**

RULING

[1] The appellant had been convicted on 03 April 2019 by the General Court Martial (GCM) of one count of committing a Civil Offence contrary to section 70 of the Army Act 1955 *i.e.* rape contrary to sections 207(1) and (2)(b) of the Crimes Act, in that he, inside QEB cell block, Suva, on 24 February 2018 inserted his finger into the vagina of 33696 Pte Letila Tikinamasei without her consent and knew that she was not in the capacity to give such consent.

[2] The appellant had also been convicted by the General Court Martial of one count of committing a Civil Offence contrary to section 70 of the Army Act 1955 *i.e.* sexual assault contrary to section 210(1) (a) of the Crimes Act, in that he, inside QEB cell

block Suva on the 24 February 2018 unlawfully and indecently touched the vagina of 33696 Pte Letila Tikinamasei.

[3] On the 15 April 2019 the appellant had been sentenced in absentia by the GCM to 10 years imprisonment for rape and 03 years imprisonment for sexual assault, both sentences were to be served concurrently with a non-parole period of 09 years.

[4] The sentence of the GCM had been confirmed by the Commander of the Republic of Fiji Military Forces on 25 April 2019.

[5] Through the Legal Aid Commission (LAC) the appellant had tendered a timely appeal against conviction and sentence on 14 May 2019. LAC had tendered amended notice of appeal on 14 October 2020 along with written submissions on the main appeal and bail pending appeal. Notice of motion seeking bail pending appeal accompanied by the appellant's affidavit had been tendered on 26 November 2020. The respondent had filed an affidavit opposing bail pending appeal and written submissions on 21 December 2020.

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal 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), **Chaudry 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.

[7] Grounds of appeal urged on behalf of the appellant are as follows:

Conviction

(i) THE General Court Martial erred in fact and in law when it found the Appellant guilty of both of the counts he was charged with when its finding is unreasonable and cannot be supported by the evidence that was adduced during trial.

(ii) THE General Court Martial erred in fact and in law when it found the Appellant guilty of both of the counts he was charged with when the State's case was grossly discredited and ruled out the caution interview which was the only direct evidence that the State relied upon.

Sentence

(iii) THE sentence imposed on the Appellant is harsh and excessive.

01st and 02nd grounds of appeal

[8] It is convenient to consider both grounds of appeal together as they appear to be intertwined. It appears that after the Judge Advocate had summed-up to the General Court Martial after the closing addresses in terms of section 65 of the Rules of Procedure (Army) 1972 it had found the appellant guilty and the Judge Advocate had not re-advised the GCM in terms of section 80(5) of the Rules of Procedure (Army) 1972.

[9] The evidence against the appellant before the GCM consisted of the admitted facts signed by the parties on 27 Match 2019, his cautioned interview tendered as exhibit 13 and the evidence of the complainant.

[10] The admitted facts recorded under paragraph 19 and 26 show that the appellant and two others had assisted carrying the complainant W33699 Pte Letila Tikinamasei who was heavily intoxicated and sleeping from the back seat of the taxi into QEB cell room number 07 and the appellant was present at the guard room and cell block from 23 to 24 February 2018. Thus, the admitted facts had put the appellant in a position where he could commit the alleged crimes, if not very much at the crime scene.

[11] Another agreed fact was to the effect that the complainant was heavily intoxicated and she had felt extreme pain from her waist and around the pubic area. The complainant had reiterated this in her evidence and stated that she had felt pain inside and outside of her vaginal area.

[12] The appellant in his cautioned interview had admitted that the woman he assisted in carrying into the cell was the complainant. Further he had admitted having removed her pants, touched her vagina and inserted his right finger and opened her vagina while the complainant was unconscious. He had also admitted having dressed her after filming but before fully covering her private parts with her pants he had penetrated her vagina with his finger to clear open it so that Pte Serubasaga (co-accused who pleaded guilty) could get a clear shot of the complainant's vagina with his mobile phone. Thereafter, the appellant had dressed her fully and left the cell room.

[13] At the end of the prosecution case the appellant had made a brief statement *'allegation was not true'* but not stated that the cautioned interview was a fabrication or that he did not understand the questions and answers as the interview was conducted in English. He had not said anything which could demonstrate that the cautioned interview was a fabrication or even remotely imply that he did not understand the questions and answers as the interview was conducted in English.

[14] The counsel for the appellant argues that the interviewing officer had admitted that the record of interview could not be relied upon at page 90 of the GCM record. However, it looks to be too simplistic an argument in the light of the entirety of the proceedings. In the first place the defense counsel had not asked for a *voir dire* inquiry because she would proceed on the ground that the cautioned interview was a fabrication (see page 35 of the GCM record). The interviewing officer's single answer at page 90 had come in response to two loaded questions at page 89 and 90 that he had recorded the cautioned interview in English when the appellant wanted to be interviewed in iTaukei language and that it was a breach of Article 13 of the Constitution. Thus, the interviewing officer's answer *'correct ma'am'* at page 90

should be confined only on the issue of language rather than on the reliability of the cautioned interview.

[15] The defense had not raised this issue of language prior to the trial proper or at least at the time the cautioned interview was led in evidence. If the whole of the cautioned interview was a fabrication, it would not have mattered whether it was recorded in English or iTaukei. Therefore, the language issue raised belatedly by the defense seems to be an afterthought.

[16] The respondent had argued that the appellant's preferred language during the preliminary stages was English as shown at page 5 of the GCM record where he had answered the president of the GCM that he did not need a translator but could understand English. At page 20 he had addressed the Judge Advocate in English regarding his legal aid application. In the arraignment of the GCM proceedings the charges had been read over to the appellant and he had understood the same and pleaded not guilty in English (see pages 28 and 29 of GCM proceedings). The respondent had also submitted that the appellant had admittedly studied up to Form 6 (in English) at Ratu Sir Lala Sukuna Memorial School and therefore should be proficient in English. His unsworn statement at the end of the prosecution case had also been made in English.

[17] I have examined the cautioned interview in toto and find that the appellant had given logical and coherent answers and had remained silent also at times. He obviously had no difficulty in understanding the questions and answers including his constitutional rights explained by the interviewing officer.

[18] Therefore, despite his initial answer that he wished his interview to be recorded in Fijian language (assuming that want he meant was iTaukei language) he had not been prejudiced at all by conducting the interview in English language and no breach of Article 13(1)(a) had occurred, for Article 13(1)(a) requires the a person arrested or detained to be informed <u>in a language that he or she understands</u> and not necessarily his or her preferred language.

[19] The appellant's counsel had also argued that there appear to be two different accounts of the appellant's cautioned interview with the witnessing officer confirming that her signature was not the one on the copy of the cautioned interview with the defense counsel. The counsel argues that this goes to show that the confessional statement was a fabrication. The only cautioned interview statement produced at the trial was marked as Exhibit 13 attached to GCM proceedings under serial number 18. The defense counsel, despite being armed with an alleged different version of the cautioned interview, had not produced or marked her copy at the trial. The witnessing officer had confirmed all her signatures including her signature after the last question and answer 56 (which was the subject of alleged difference) found on the original copy of the cautioned interview marked as Exhibit 13 to be her signatures (see page 99 of the GCM proceedings).

[20] The respondent has submitted that there was only one copy of the cautioned interview that was produced before the GCM and that was the original marked as Exhibit 13.

[21] The appellant had not averred that the signatures in front of the word 'suspect' on the original cautioned interview marked as Exhibit 13 were not his signatures. His only response to the evidence led by the prosecution was *'allegation was not true'*. Thus, any alleged discrepancy regarding the last signature of the witnessing officer on an alleged (yet not produced) but non-existent copy of his cautioned interview before the GCM would not make the cautioned interview a fabrication.

[22] Therefore, having examined the record, I am not satisfied that the GCM, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt. I think that upon the whole of the evidence it was open to the GCM to be satisfied of guilt beyond reasonable doubt (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) and **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[23] In the circumstances, both grounds of appeal against conviction have no reasonable prospect of success.

Sentence appeal

[24] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal filed within time to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[25] The counsel for the appellant argues that the sentence was harsh and excessive.

[26] In **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) the Court of Appeal delved into the sentence for adult rape as follows:

> *'While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.*

[27] The Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment.

[28] When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[29] Given all the circumstances of the case, I am of the view that the sentence of 10 years is one that could reasonably have been imposed by a sentencing judge and the sentence imposed lies within the permissible range and proportionate to the gravity of the offences.

[30] Accordingly, there is no reasonable prospect of success as far as the sentence appeal is concerned.

Bail pending appeal

[31] 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."*

[32] 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)

[33] 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.'*

[34] 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).'*

[35] 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'.*

[36] 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...."*

[37] 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 ... ."*

[38] ***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."*

[39] 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.

[40] 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.

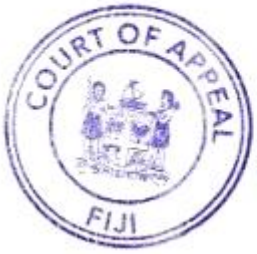
[41] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then 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'.

[42] As I have already held there is no reasonable prospect of success as far as the conviction and sentence appeals are concerned. Therefore, the appellant cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. In addition, there is every chance that his appeal would be heard well before the appellant would reach even his non-parole period. The appellant had been previously granted bail pending trial by the GCM but had to be sentenced in absentia as he was absconding until his arrest by FMPU.

[43] Therefore, I reject the appellant's application for bail pending appeal.

Orders

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



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