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

CRIMINAL APPEAL NO.AAU 131 of 2018
[In the High Court at Lautoka Case No. HAC 130 of 2016]

BETWEEN	:	**SAMUELA TAWANANUMI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. T. Kean for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**19 December 2022**
Date of Ruling	:	**20 December 2022**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act of 2009 and one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Lautoka in the Western Division. The victim was 09 years old and the appellant was her biological father of 28 years of age at the time of the commission of the offences.

[2] At the conclusion of the summing-up on 29 November 2018 the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors in his judgment delivered on 04 December 2018, convicted the appellant on all counts and sentenced him on 06 December 2018 to 04 years on imprisonment on count 01 and 14 years of imprisonment on count 02 (both to run concurrently) subject to a non-parole period of 12 years.

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

Conviction

1. *The learned trial judge had erred in law and in facts in allowing the complainant to read her statement in court whilst she was giving evidence which is inadmissible amounting to prior consistent statement.*

2. *The learned trial judge had erred in law and in facts by directing the assessors and himself in that the complainant's evidence is further bolstered by the recent complaint evidence.*

[4] I allowed leave to appeal on both grounds of appeal and stated as follows:

'[14] The crucial issue is whether in any event a police statement made by a victim of a sexual crime could be led as recent complaint evidence or for that matter as any form of substantive evidence. The trial judge had directed the assessors to consider the statement of the victim to the police as evidence before the trial court for all purposes and to give such weight to it as they thought appropriate. In other words the trial judge had treated the contents of the victim's police statement as substantive evidence.

[15] Neither party had referred to this court any authorities on these important issues. The written submission of the state filed in this court has maintained a deafening silence on these vital matters and not enlightened court on what basis the prosecution had read the victim's police statement in evidence at the trial. Regrettably, the state's written submission had taken the path of least assistance to this court.

[16] Both counsel submitted that section 134 (1) of the Criminal Procedure Act, 2009 makes a written statement by any person admissible as evidence having the similar effect to oral evidence by that person provided the conditions in sub-section (2) are satisfied. It is not clear whether in this case such conditions in section 134(2) as are applicable had been satisfied before the victim's police statement was read in evidence. Without the complete trial proceedings, I cannot probe this issue any further at this stage.'

[20] It appears that the victim had confided with the grandmother, Ana as to what the appellant had done to her a few months (05) after the incidents in November 2016. Therefore, whether Ana's evidence could have been treated as recent complaint evidence is another matter to be considered in the case.'

[5] The question for the full court would be considering the totality of the evidence in the case whether there was a substantial miscarriage of justice by the trial judge's direction to the assessors to consider the statement of the victim to the police as evidence before the trial court for all purposes and to give such weight to it as they thought appropriate and also whether the contents of the victim's police statement can be treated as substantive evidence as the trial judge appears to have done. If not, the proviso to section 23 (1)(a) of the Court of Appeal Act could cure the defective directives.

[6] **Firstly,** the appellate court would consider ignoring the evidence of the victim's police statement whether there was sufficient evidence on which the assessors could express the opinion that the appellant was guilty and on which the trial judge could find him guilty (*i.e.* quantity/sufficiency of the evidence available sans the impugned item of evidence). **Secondly,** the court would see whether the assessors and the judge would have found the appellant guilty even in the absence of the victim's police statement (*i.e.* whether the quality/credibility of the available evidence without the impugned evidence is capable of proving the case against the accused beyond reasonable doubt).

[7] In other words, having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[8] Similarly, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[9] Regarding the misdirection of the trial judge to the assessors to consider recent complaint evidence as bolstering the victim's evidence, the proper test for the appellate court is if the appellate court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have

convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[10] However, I cannot say at this stage that any of the grounds of appeal has a very high likelihood of success. These are matters for the full court to consider and determine.

Law on bail pending appeal

[11] 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), **Qurai 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)].

[12] 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.

[13] 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'.

[14] As stated earlier the appellants cannot be said to be having a 'very high likelihood of success' in his appeal at this stage. No other exceptional circumstances have been demonstrated.

[15] I shall in any event 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.

[16] The appellant is serving 14 years of imprisonment and it will not make much of a difference to his balance sentence to be served as to when his appeal is going to be taken up before the full court for hearing. However, the certified records have been uplifted by both parties and directives for written submissions for the full court hearing have been given. The LAC is relying on WS filed at the leave stage while respondent's WS is due on 30 January 2023. The appeal has been marked as ready to be taken up before the full court. Therefore, it appears that section 17(3) (b) and (c) need not be considered in favour of the appellant at this stage.

Order of the Court:

1. Bail pending appeal is refused.

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